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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE JUUL LABS, INC., MARKETING,
SALES PRACTICES, AND PRODUCTS
LIABILITY LITIGATION

This Document Relates to:

All Class Actions

CASE NO. 19-md-02913-WHO

**REPLY IN SUPPORT OF MOTIONS FOR
FINAL APPROVAL OF JLI CLASS
ACTION SETTLEMENT AND
ATTORNEYS' FEES, EXPENSES, AND
SERVICE AWARDS**

MOTION HEARING

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HON. WILLIAM H. ORRICK III

REPLY ISO MOTIONS FOR FINAL APPROVAL OF JLI CLASS ACTION SETTLEMENT AND
ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS
CASE NO. 19-md-02913-WHO

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21	Fed. R. Civ. P. 23	11, 46
22	Fed. R. Civ. P. 23(c)	10
23	Fed. R. Civ. P. 23(c)(2)(B)	11, 12
24	Fed. R. Civ. P. 23(c)(3).....	10
25	Fed. R. Civ. P. 23(f).....	23
26	Fed. R. Civ. P. 23(h)	41
27	Fed. R. Civ. P. 53	41
28	Fed. R. Civ. P. 53(g)(2).....	41
	Fed. R. Civ. P. 54(d)(2)(D).....	41

1 **I. INTRODUCTION**

2 On June 23, 2023, Class Plaintiffs filed a motion seeking final approval of the Class Action
3 Settlement with JUUL Labs, Inc. (“JLI”) and the Released Parties (the “JLI Settlement” and the “Final
4 Approval Motion,” Dkt. 4054) and Class Counsel filed a motion seeking the payment of attorneys’ fees,
5 expenses, and service awards (the “Fee and Expense Motion,” Dkt. 4055). In contrast to the few
6 objections received, the positive response from the class confirms the fairness and adequacy of the JLI
7 Settlement and the reasonableness of the requested fees, expenses, and service awards.

8 Out of millions of class members, the only objections to final approval of the settlement were
9 filed by one public-interest organization that does not challenge the fundamental fairness, suggesting
10 instead that a portion of the money be spent differently. Other objectors challenge the rejection of
11 aggregated claims submissions by a third-party filer, voice disagreement with the premise of the
12 lawsuit, or provide no basis at all for their objections. The relative lack of objections addressing the
13 terms of the settlement reflects the significant value it delivers to the class: a \$255 million non-
14 reversionary cash fund, and resolution of hotly contested litigation. The millions of claim forms
15 submitted to date reflect the strong response from the class.

16 No objections to the requested expense payments or service awards were filed, and only one
17 class member, Reilly Stephens, objected to the requested fee award. Contrary to Mr. Stephens’ belief,
18 success in this litigation was by no means assured. The case became even riskier as JUUL appeared
19 destined for bankruptcy court. Stephens is also wrong to believe that the \$255 million settlement before
20 the Court is attributable to government investigations or other extrinsic factors, rather than Class
21 Counsel’s skill and creativity in bringing this case to trial, and manifest willingness to bear the risk of a
22 loss at trial. Under Ninth Circuit authority, both the results and the work performed to achieve those
23 results support an upward adjustment from the 25% benchmark. The Ninth Circuit’s well-settled
24 approach to attorneys’ fees is case-specific and should not be supplanted with a context-blind reliance
25 on average fee awards from a spectrum of other cases. Stephens’ challenges to counsel’s lodestar are
26 misguided, and in any event, even if applied, do not change the result: the requested fee award is
27 reasonable.
28

In light of the robust response from the class and the lack of sustainable objections, Class Plaintiffs request that the Court grant final approval of the JLI Settlement and Class Counsel requests that the Court grant their requested attorneys' fee, expense, and service awards.

II. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT AND CERTIFY THE SETTLEMENT CLASS

A. The Response of the Class

In the Final Approval Motion, Class Plaintiffs described how the relevant factors, including “the reaction of class members to the proposed settlement,” weighed strongly in favor of approval of the JLI Settlement. Dkt. 4054 at 7-19; *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). Now that the deadline for claims, opt-out requests, and objections has passed, Class Plaintiffs can more fully assess the reaction of the Class. As set forth below, the response from Class Members was overwhelmingly positive and supports approval of the JLI Settlement.

Claims: Of the estimated six to eleven million Class Members (Sharp Reply Decl., ¶¶ 24–25), approximately 2.7 million received direct notice of the JLI Settlement, and the remainder received indirect publication notice. Supplemental Declaration of Cameron R. Azari ¶ 6. In response to the settlement notice, Epiq received 6,349,982 claims. *Id.* ¶ 36. The process of reviewing these claims is ongoing and, while many appear invalid, even if only 20% of the claims are paid to Class Members, the overall claims rate for the Class will be between 12% and 21%.

By any measure, these claims rates represent a positive reaction from the Class, and thus support the JLI Settlement. *See Schneider v. Chipotle Mexican Grill, Inc.*, 336 F.R.D. 588, 599 (N.D. Cal. 2020) (“0.83% claims rate” was “on par with other consumer cases”); *Broomfield v. Craft Brew Alliance, Inc.*, 2020 WL 1972505, at *7 (N.D. Cal. Feb. 5, 2020) (finding claims rate “of about two percent” to be consistent with the rates in other large class actions); *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 589 (N.D. Cal. 2015) (6% claims rate represented a “positive reaction by the class”); *Fraser v. Asus Comp. Int’l*, 2013 WL 3595940, at *2 (N.D. Cal. July 12, 2013) (“[T]he large number of class members

wishing to participate in the settlement is evidence that the settlement is reasonable and should be approved.”).¹

Opt-Outs: Out of the millions of Class Members, 2,620—or between 0.02% and 0.04% of the class—have sought to exclude themselves from the JLI Settlement. Supp. Azari Decl. ¶ 37. The low number of opt-out requests relative to the estimated range in the size of the Class also weighs strongly in favor of approval. *See In re MacBook Keyboard Litig.*, 2023 WL 3688452, at *9 (N.D. Cal. May 25, 2023) (finding that the “low number . . . of opt-outs relative to the size of the class weighs in favor of approving the Settlement” where 1,733 exclusion requests were received out of 718,651 eligible class members); *Quiruz v. Specialty Commodities, Inc.*, 2020 WL 6562334, at *7 (N.D. Cal. Nov. 9, 2020) (approving settlement with 0.09% opt-out rate, and noting that “[o]pt-out percentages of nearly 5% have been deemed so ‘overwhelmingly positive’ as to support approval”).

Objections: Of the 451 objections to the JLI Settlement,² only two address the substance of the JLI Settlement. Neither of those objections calls into question the sufficiency of the key components of the JLI Settlement: the \$255 million cash payment in the face of substantial litigation risk, and a release of economic loss claims. The lack of substantive objections to the JLI Settlement—particularly in comparison to the millions of Class Members and claims received—itself “raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.” *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (citation omitted); *see also Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) (approving district court’s finding that the class reacted favorably where there were “only fifty-four submitted objections” out of 376,301 class members); *Churchill*, 361 F.3d at 577 (affirming approval of class action settlement where 45 out of 90,000 class members objected to the settlement); *Knisley v. Network Assocs., Inc.*, 312 F.3d 1123, 1125

¹ The high volume of claims—and the work that will be needed to screen invalid claims—further supports Class Plaintiffs’ request for the payment of up to \$7 million to Epiq for settlement notice and administration costs. Final Approval Motion at 23-24.

² In total, 452 objections were submitted, only one of which—the Stephens objection, addressed below—takes issue with the requested attorneys’ fees, rather than approval of the JLI Settlement. Class Plaintiffs’ July 21 notice provided a slightly lower number of objections (*see* Dkt. 4075), because untimely objections (addressed in the context of the third-party filer discussion below) were received by counsel after the July 21 filing.

(9th Cir. 2002) (dismissing objection after approval of settlement to which six class members out of roughly 150,000, or 0.004%, objected).

The other 449 objections consist of: (1) two objections that voiced disagreement with the premise of the lawsuit, (2) four that provided no basis for the objection at all, and (3) 443 form objections submitted by “ClaimClam”—a third-party filer that sought to submit claims on behalf of tens of thousands of alleged class members—and its clients. Even if these objections were legitimate critiques of the JLI Settlement (they are not, for the reasons detailed below), the total number of objections is small in light of the class size and volume of claims. *See In re Google Plus Profile Litig.*, 2021 WL 242887, at *4 (N.D. Cal. Jan. 25, 2021) (approving settlement with 761 objections out of millions of class members).

Each of the objections to the JLI Settlement is addressed in detail in the following section. For the Court’s reference, Appendix A includes a chart that identifies where in the record each objection (or group of related objections) can be found on the docket.

B. The Objections Provide No Basis to Reject the Settlement

1. The PHAI Objection (Dkt. 4062) Is Legally Unsupportable and Seeks Relief That is Both Unrelated to the Economic Loss Claims in the Class Action and Provided Through Other Settlements in the MDL

Matthew Murphy, Cade Beuparlant, and Marianne Savage, who are represented by the Public Health Advocacy Institute (“PHAI Objectors”), argue that the JLI Settlement is not fair, reasonable, and adequate unless \$30 million of the proposed Settlement Fund is allocated to a non-profit *cy pres* recipient “dedicated to delivery” of “effective treatment methods for nicotine addiction among adolescents.” Dkt. 4062 at 1. In essence, the PHAI Objectors request that the Court modify the JLI Settlement to divert funds from Class Members to a *cy pres* recipient.³ The Court should deny the PHAI Objectors’ request because the JLI Settlement is fair, reasonable, and adequate, particularly because all or virtually all available Settlement Funds will be distributed directly to injured Class Members. In

³ PHAI Objectors ask too much of the Court, as courts “may not delete, modify, or substitute certain provisions” of a settlement agreement. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (quoting *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 630 (9th Cir. 1982)).

1 addition, the relief the PHAI Objectors seek is outside the scope of Class Plaintiffs’ economic loss
 2 claims and is already provided in large part by the other settlements, inside and outside of this MDL, as
 3 described below.

4 **a) Distribution of Settlement Funds to Class Members is Preferable to**
 5 ***Cy Pres* Distributions**

6 After years of hard-fought litigation, Class Plaintiffs and JLI reached an agreement to create a
 7 \$255 million fund to compensate Class Members for the economic losses they suffered through JLI’s
 8 alleged conduct. *See generally* Final Approval Motion, § II.A.–B. The JLI Settlement provides
 9 substantial monetary recovery to injured Class Members, avoids the risks of continued litigation, and
 10 releases JLI from the threat of future economic loss claims. *Id.*, §§ II.B., III.A.

11 The PHAI Objectors’ argument to allocate \$30 million of the Settlement Fund to a *cy pres*
 12 recipient is contrary to the “strong preference for distribution to class members instead of *cy pres*
 13 distributions.” *Reid v. I.C. Sys. Inc.*, 2021 WL 4710779, at *3 (D. Ariz. Sept. 2, 2021) (authorizing
 14 second cash distribution to class members over *cy pres* distribution despite settlement agreement not
 15 containing provision for second distribution); *In re Anthem Inc. Data Breach Litig.*, 327 F.R.D. 299, 333
 16 (N.D. Cal. 2018) (Koh, J.) (describing “the law’s general preference for *cy pres* awards to be limited to
 17 scenarios where it is not feasible to make further distributions to class members”). The JLI Settlement is
 18 in-line with numerous other settlements of economic loss claims that provide for cash distributions to
 19 class members. *See e.g.*, *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., &*
 20 *Prod. Liab. Litig.*, 2013 WL 12327929, at *2 (C.D. Cal. July 24, 2013) (granting final approval of
 21 settlement resolving economic loss claims that provided cash distribution and “eliminated” spillover *cy*
 22 *pres* contributions in favor of remaining settlement funds escheating pursuant to applicable State law).
 23 That the Settlement Fund will likely be exhausted through distribution to Class Members, rather than
 24 resorting to a less-preferred *cy pres* distribution, itself supports the finding that the JLI Settlement is fair,
 25 reasonable, and adequate.

26 Even if a *cy pres* distribution was preferable to paying injured class members, the Ninth Circuit
 27 has made clear that just because a settlement could have been better, or could have offered a different
 28 form of relief, does not mean the settlement is not fair, reasonable, and adequate. *Hanlon v. Chrysler*

1 *Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v.*
 2 *Dukes*, 564 U.S. 338 (2011) (“Of course it is possible, as many of the objectors’ affidavits imply, that
 3 the settlement could have been better. But this possibility does not mean the settlement presented was
 4 not fair, reasonable or adequate.”); *see also Ross v. Trex Co., Inc.*, 2013 WL 6622919, at *4 (N.D. Cal.
 5 Dec. 16, 2013) (noting court’s role is not to examine whether a settlement “could have been better by
 6 providing different or additional relief.”). For example, in *Edwards v. National Milk Producers*
 7 *Federation*, the Court granted final approval over an objection “that the settlement does not provide for
 8 ‘a new program to encourage, fund, and foster small local dairy producers’” and instead provided cash
 9 compensation. 2017 WL 3616638, at *6 (N.D. Cal. June 26, 2017), *objections overruled*, 2017 WL
 10 3623734 (N.D. Cal. June 26, 2017), *aff’d sub nom. Edwards v. Andrews*, 846 F. App’x 538 (9th Cir.
 11 2021). The court noted that the Ninth Circuit has made clear that its inquiry “is not whether the final
 12 product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.”
 13 *Id.* (citing *Hanlon*, 150 F.3d at 1027). Similarly, in *Vianu v. AT&T Mobility LLC*, the court granted final
 14 approval of a settlement over an objection that the settlement was inadequate because it lacked
 15 injunctive relief, finding cash compensation was sufficient. 2022 WL 16823044, at *8 (N.D. Cal. Nov.
 16 8, 2022). PHAI Objectors’ preference for a different form of relief does not, and cannot, undermine the
 17 reasonableness of the JLI Settlement.

18 **b) The Relief PHAI Objectors Was Never Part of this Class Action**

19 The relief PHAI Objectors seek—equitable relief to redress harm to addicted persons and to
 20 public health—may be laudable, but was never part of this class litigation. The consolidated class action
 21 complaints at all times focused exclusively on providing compensation for economic injuries to JUUL
 22 purchasers. The release is similarly tailored to claims arising out of “economic loss.” Settlement, § 1.29.
 23 So the equitable fund the objection requests is not something that the Class could have achieved at trial.
 24 While a settlement can provide for relief that could not have been obtained through litigation, the fact
 25 that this case was litigated with a sole focus on compensation for economic harm demonstrates that the
 26 JLI Settlement’s redressing of those injuries is fair and reasonable. Moreover, the PHAI objection does
 27 not acknowledge that the injuries to persons and to public health are redressed by the substantial
 28 government entity, tribal, and attorney general settlements reached with JLI. The MDL settlements

1 provide funds to more than 1,400 government entities and 32 tribes, helping them to prevent and
 2 mitigate youth use of e-cigarettes across the United States. In addition, in the wake of work performed in
 3 the MDL (described further below), attorneys general from numerous states have recovered
 4 approximately \$1 billion in settlements and injunctive relief regulating JLI's conduct going forward.⁴

5 **2. The Gugliotta Objection (Dkt. 4026) Should be Overruled for the Reasons** 6 **Provided in the Final Approval Motion**

7 John Gugliotta submitted an objection in May 2023 and Class Plaintiffs addressed that objection
 8 in their Final Approval Motion. Dkt. 4054 at 15-16. As set forth in the motion, similar objections by
 9 Gugliotta (*i.e.*, that JLI should have admitted fault as part of a private settlement, and that the JLI
 10 Settlement should have addressed the conduct of the entire e-cigarette industry) have been rejected by
 11 other courts and have no bearing on whether the relief provided to the class is adequate.

12 **3. The Ashak and Marcom Objections (Dkts. 4086-1 and 4033) Express** 13 **Disagreement with the Litigation, But Not the JLI Settlement**

14 Two objections—submitted by Olin Ashak and Samuel Marcom (Dkts. 4086-1 and 4033)—do
 15 not take issue with any aspect of the JLI Settlement, but instead express disagreement with the premise
 16 of the lawsuit (suggesting it never should have been brought in the first place). Marcom's preferred
 17 outcome is not for the JLI Settlement to be rejected, but for the “case to be thrown out” (which he at the
 18 same time recognizes would not happen). Dkt. 4033.⁵ And Ashak likewise wishes to “voice my
 19 disagreement and objection to the lawsuit.” Dkt. 4086-1. Disagreement with the litigation itself “is not a
 20 basis for denying the motion for final approval.” *Quiruz*, 2020 WL 6562334, at *8; *see also Perkins v.*
 21 *LinkedIn Corp.*, 2016 WL 613255, at *4 (N.D. Cal. Feb. 16, 2016) (overruling objections that “oppose
 22

23 ⁴ <https://ag.ny.gov/press-release/2023/attorney-general-james-secures-462-million-juul-its-role-youth-vaping-epidemic#:~:text=As%20part%20of%20a%20multistate,abatement%20programs%20across%20the%20state> (describing six-state settlement with JLI for \$462 million and injunctive relief aimed at addressing the youth nicotine epidemic); <https://www.texasattorneygeneral.gov/news/releases/paxton-announces-439-million-multistate-settlement-juul-deceptive-marketing-and-sales-practices> (describing 34-state settlement with JLI providing \$438.8 million in compensation); <https://www.nytimes.com/2021/06/28/health/juul-vaping-settlement-north-carolina.html> (describing \$40 million settlement between JLI and the State of North Carolina).

28 ⁵ Class Counsel also addressed the Marcom objection in their Final Approval Motion. Dkt. 4054 at 15.

the claims alleged” and “appear to support no recovery for the Class”); *Ko v. Natura Pet Prods., Inc.*, 2012 WL 3945541, at *6 (N.D. Cal. Sept. 10, 2012) (“[A]n objection based on a concern for the Defendants and an apparent non-substantive assessment of the frivolity of the action are not germane to the issue of whether the settlement is fair.”).

The Ashak objection also asserts that the objection process was “difficult” without any further specificity. *Id.* Courts routinely overrule challenges to the objection procedures. *See In re Facebook Internet Tracking Litig.*, 2022 WL 16902426, at *6 (N.D. Cal. Nov. 10, 2022) (signature requirement and disclosure of personal information not unreasonable); *DeMarco v. Avalonbay Communities, Inc.*, 2017 WL 960355, at *3 (D.N.J. Mar. 13, 2017) (“the procedure of requiring opt-outs and objections to be sent to the Clerk of the Court and to counsel for the parties to this federal action is neither onerous nor unusual in a class action”). Orders preliminarily certifying settlement classes have set forth similar procedures. *See, e.g., Moore v. Verizon Commc’ns Inc.*, 2012 WL 12920712, at *5 (N.D. Cal. Feb. 28, 2012) (objection procedure requiring “a detailed statement of objections to be made, including all factual and legal support for such objection . . . any evidence supporting the objection that is intended to be introduced in support of the objection, including evidence of the objector’s membership in the Settlement Class . . . whether the objector or objector’s counsel intends to appear at the Final Approval Hearing.”); *Razo v. AT&T Mobility Servs., LLC*, 2022 WL 4586229, at *18 (E.D. Cal. Sept. 29, 2022) (similar).

4. The ClaimClam Objections (Dkts. 4087-90) Are Irrelevant to the Fairness of the JLI Settlement and Class Counsel’s Decision to Disallow Third-Party Filed Claims Was Reasonable

The next set of objections come from a third-party filer, ClaimClam, and hundreds of its clients, who object to the requirement that Class Members submit their claims individually, as opposed to through ClaimClam. Class Counsel directed the Settlement Administrator to reject the claims submitted *en masse* by ClaimClam based on concerns about third-party filers in general—concerns that were borne out by ClaimClam’s misleading and incomplete communications to Class Members.

The Court has discretion to set procedures for the claims process and it is well within that discretion to impose requirements designed to ensure due process and to prevent unauthorized or fictitious claims, opt-outs, and objections. *See, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig.*,

999 F.3d 1247, 1266 (11th Cir. 2021) (“The District Court was well within its broad discretion to impose the requirements” for such purposes); *In re Deepwater Horizon*, 739 F.3d 790, 809 (5th Cir. 2014) (proof of class membership requirement imposed on objector a “legitimate exercise” of court’s discretion to minimize abuse); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981) (“Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.”). The Court should exercise that discretion here and affirm Class Counsel’s decision to disallow third-party filed claims.

The Court should also overrule the hundreds of nearly identical objections submitted by ClaimClam’s clients, which were solicited by and follow a template provided by ClaimClam. *See In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *14 (N.D. Ga. Mar. 17, 2020), *aff’d in part, rev’d in part on other grounds*, 999 F.3d 1247 (11th Cir. 2021) (rejecting 718 form objections “submitted en masse by . . . a class action claims aggregator that created a website . . . that encouraged individuals to object based on [] erroneous information”).

Class Counsel’s priority is to ensure that Class Members receive accurate information about the JLI Settlement and, if they then choose to submit a claim, receive their fair share of the Settlement. Thus, if the Court overrules ClaimClam’s objection, Class Counsel will nonetheless permit affected Class Members an opportunity to resubmit their claims on their own behalf, and to treat those resubmitted claims as timely, subject to the Court’s approval.

a) ClaimClam Background

Zimin Hang objected to the JLI Settlement “both as a Class Member” and “as the CEO of Communion Inc. (DBA ClaimClam).” Sharp Reply Decl., Ex. 3 (“Hang Objection”).⁶ ClaimClam is a third-party filer, soliciting and submitting claims *en masse* to various class action settlements for its

⁶ Although Zimin Hang electronically signed the correspondence and it otherwise appears to be from him, the attestation provides: “I declare under penalty of perjury under the laws of the United States of America that Heather Aubuchon is a member of the Class.” *Id.* Class Counsel presume this was a copy-paste error, as Heather Aubuchon has not otherwise submitted an objection to the JLI Settlement. Even setting aside this procedural deficiency in Hang’s objection, the Court should reject it on the merits.

clients in exchange for 15% of their recoveries. *Id.*, ¶ 28 & Ex. 4 at 34. Hang objects to the JLI Settlement based on the rejection of third-party filer claims.

In addition to the objection by Hang, ClaimClam solicited objections to the JLI Settlement from its clients and drafted objections for them based on a template objection form. *See Id.*, ¶¶ 27, 33 & Ex. 8. ClaimClam clients ultimately submitted 442 objections to the Settlement Administrator regarding the rejection of claims submitted by ClaimClam, all of which appear to have been created using ClaimClam’s template. *Id. See Equifax*, 2020 WL 256132, at *10 (placing little weight on objections made “at the behest” of others). Importantly, none of the ClaimClam objections argue that the JLI Settlement itself is unfair or inadequate, and instead they protest only the rejection of claims submitted through an agent. Many of these 442 template objections have significant procedural deficiencies.⁷ But because they provide no basis to reject the JLI Settlement, the Court should overrule on the merits all objections related to ClaimClam.

b) Class Counsel Have Valid Concerns About Third-Party Filers

When the issue of third-party filers arose in this case, Class Counsel considered the relevant law and then directed the Settlement Administrator to reject claims submitted by third-party filers based on legitimate concerns about allowing such claims.

To protect Class Members’ due process rights, rule 23(c) requires the Court to “direct to class members the best notice that is practicable under the circumstances,” and provides that “[t]he notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

⁷ 137 of the 442 ClaimClam client objections are procedurally deficient in one or more ways. *See Order*, Dkt. 3779 (setting requirements for information objectors must provide). 129 objections were untimely. Eighteen did not include the required attestation that the objector is a Class Member, eleven fail to include the name and contact information of the objector, and seven objections do not include the template’s narrative describing the basis of their objection, or any other basis. Sharp Reply Decl., ¶ 27.

1 Fed. R. Civ. P. 23(c)(2)(B). The purpose of these requirements is “is to present a fair recital of the
 2 subject matter of the suit and to inform all class members of their opportunity to be heard.” *In re*
 3 *Gypsum Antitrust Cases*, 565 F.2d 1123, 1125 (9th Cir. 1977). In its Order directing notice of the JLI
 4 Settlement to the Class, the Court evaluated and approved the Notice Plan here, “including the form,
 5 method, and content of the proposed notices (as revised), as well as the proposed claim forms.” Dkt.
 6 3779 at 7. It made a preliminary finding that the notice complies with Due Process and Rule 23. *Id.*

7 Third-party filers and claims aggregators like ClaimClam are bound by none of these rules or
 8 requirements, and thus can frustrate the Court approved communications to the Class. “Misleading
 9 communications to class members concerning the litigation pose a serious threat to the fairness of the
 10 litigation process, the adequacy of representation and the administration of justice generally.” *In re*
 11 *School Asbestos Litigation*, 842 F.2d 671, 680 (3d Cir.1988) (citing *Gulf Oil Co. v. Bernard*, 452 U.S.
 12 89, 101 n.12 (1981)). “[U]napproved communications to class members that misrepresent the status or
 13 effect of the pending action also have an obvious potential for confusion and/or adversely affecting the
 14 administration of justice.” *Gulf Oil*, 452 U.S. at 101 n.12. The risk of unfairness or confusion is
 15 significant because there is no assurance that a third-party filer’s communications are accurate and
 16 complete.

17 In addition, because they receive a percentage of all settlement proceeds obtained for their
 18 clients, entities like ClaimClam have little incentive to ensure the claims it solicits are authentic. Courts
 19 often cite similar concerns in rejecting mass objections and opt-outs of class settlements. For example,
 20 the court in *Equifax* rejected objections to a personal signature requirement, noting it was “of particular
 21 importance in this case, to ensure that the objection is made in the objector’s personal capacity, and not
 22 at the behest of others. And, the personal signature requirement decreases the likelihood that services
 23 encouraging mass objections or opt-outs file unauthorized or fictitious objections.” 2020 WL 256132, at
 24 *26. The *Equifax* court further noted:

25 While technology provides an avenue for filing claim forms more easily, it also makes it
 26 easier for third parties and their counsel to file unauthorized ‘mass opt-outs,’ which are
 27 sometimes ‘highly indicative of a conclusion that such counsel did not spend much time
 28 evaluating the merits of whether or not to opt-out in light of the individual circumstances
 of each of their clients and in consultation with them.’

1 *Id.* Aggregated claims submitted by a financially-interested third-party filer raise similar concerns to
 2 mass opt-outs and objections.

3 **c) ClaimClam Validates Class Counsel's Concerns**

4 ClaimClam's communications with Class Members turned out to be incomplete and
 5 misleading, creating confusion amongst the Class and ClaimClam's clients.

6 ClaimClam solicited Class Members to submit claims without first providing any of the required
 7 notice content. The home page of ClaimClam's website, <https://www.getclaimclam.com>, prompts users
 8 to "get what you're entitled to" from class action settlements. Sharp Reply Decl., ¶¶ 28-29 & Ex. 4 at 1.
 9 After clicking a button to "get started," users are provided with the following information: "Juul Labs,
 10 Facebook, and other US companies have agreed to pay over \$1 billion as a result of class action
 11 settlements. Your claim value could be worth \$300 or more. Complete the intake form to find out how
 12 much you're entitled to." *Id.*, ¶ 29 & Ex. 4 at 7. If a user indicates that they did purchase JUUL
 13 Products before December 7, 2022 (*id.* at 8), the user is automatically taken through a webform that
 14 asks for the data points on the claim form in this case, such as the volume of retail purchases and dates
 15 of first and last purchase (*id.*, ¶ 29 & Ex. 4 at 9-17). On the page in the form where users can upload
 16 documentation of their purchases, ClaimClam tells Class Members—inaccurately—that "without
 17 documentation the amount of money you receive from your claim will be limited to a maximum of
 18 \$300." *Id.*, ¶ 29 & Ex. 4 at 17. Only after all this information is provided by the user does ClaimClam
 19 indicate that continuing through the form will result in their filing a claim "on your behalf." *Id.*, ¶ 29 &
 20 Ex. 4 at 21. It collects the user's contact information, terms of service, and finally, acceptance of an
 21 "Authorized Agent Agreement," before submitting the claim. *Id.*, ¶ 29 & Ex. 4 at 22-30. At no point
 22 before users commit to having ClaimClam submit a claim for them are Class Members informed of a
 23 single piece of key information about the case (*id.*, ¶ 29)—not what the lawsuit was about, that they will
 24 be releasing claims against certain defendants if they submit a claim, which claims they will release,
 25 how the class is defined, not even the name of the court case. *Cf.* Fed. R. Civ. P. 23(c)(2)(B) (requiring
 26 notice include "the nature of the action," "the definition of the class," "the class claims, issues, or
 27 defenses," "that the court will exclude from the class any member who requests exclusion" and more).
 28

Responses by Class Members confirm that ClaimClam’s approach caused significant confusion. Sharp Reply Decl., ¶¶ 30–31 & Exs. 5–7. At least one Class Member received an email from ClaimClam and forwarded it to the Settlement Administrator to “verify its validity,” saying “I’m concerned with it being potential spam, but I’m unsure how they would have gathered my personal information in order to contact me.” *Id.*, ¶ 30 & Ex. 5. Other Class Members posted screenshots of the email in a Facebook group for class action settlements asking if it was a scam. *Id.*, ¶ 31 & Exs. 6–7.

ClaimClam also provided false, incomplete, and misleading information in direct communications with Class Members. For example, when ClaimClam informed its clients that the Settlement Administrator rejected third-party claims, it included 1) a misrepresentation of the value of their claim if they were to opt out of the JLI Settlement (listing what appears to be the estimated value of the Class Member’s JUUL purchases), 2) a promise to “work with a law firm in TX to help you file a new suit and recover the maximum compensation, at no cost to you” for their clients who opt out, without any reference to the possibility that a claim may be time barred, 3) an estimate of the payment the Class Member would receive if they refile their claim directly, repeating the incorrect assertion that Class Members with no documentation of their purchases will receive \$300. *See, e.g., id.*, ¶ 32 & Ex. 5.

ClaimClam also appears to have told its clients that the official claims process would be too difficult and confusing for them to complete on their own. The template objection that ClaimClam drafted for each objecting client coaches the Class Member to say: “I find the class action claims filing process to be unduly burdensome” and that ClaimClam “made the filing easier for me by simplifying the language and breaking it down into smaller, more manageable pieces.” *Id.*, ¶ 33 & Ex. 8 (forwarding directly ClaimClam’s email with the draft objection). But ClaimClam simplified the language only by removing the entire content of the Court-approved notice. *See id.*, ¶ 29. Some Class Members recognized this disconnect. For example, one Class Member submitted ClaimClam’s template objection, but later withdrew it, telling the Settlement Administrator that they “filed the claim on my own as needed without the help of my advisor as was the original problem” and that “the process on the website was easier than anticipated and did not need [ClaimClam’s] assistance as I thought.” *Id.*, ¶ 34 & Ex. 9.

Each of the above examples reinforce that Class Counsel's concerns about allowing third-party filers to submit claims *en masse* are well-founded. ClaimClam's incomplete and misleading communications to Class Members "pose a serious threat to the fairness of the litigation process," *In re School Asbestos Litigation*, 842 F.2d at 680, caused real confusion, and risk "adversely affecting the administration of justice." *Gulf Oil*, 452 U.S. at 101 n.12. Those Class Members whose claims ClaimClam attempted to submit will be given an opportunity to make a fully informed decision to resubmit their claims directly. The Court should deny ClaimClam's objections and each of the template objections of its clients.

5. The Ready, Stampfer, Stawicki, and Toole Objections (Dkts. 4086-2, 4086-3, 4077, 4086-4) Provide No Basis for Their Objections

The final four objections to the JLI Settlement all state that they "respectfully object" to the settlement without providing any reason why. Such bare-bones objections provide no basis to question the fairness of the JLI Settlement. In addition, the Stawicki objection is untimely, as it was dated July 18 (Dkt. 4077), four days after the applicable deadline.

III. THE COURT SHOULD GRANT THE REQUEST FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

Only one objection (from Reilly Stephens) takes issue with Class Counsel's requested award of attorneys' fees. Stephens' objection does not challenge the fairness or reasonableness of the JLI Settlement, or the requested expense reimbursement and service awards. Dkt. 4063. Stephens' focus is attorneys' fees, but none of the arguments he offers warrants the reduction in fees he proposes.

Given the results achieved, the considerable litigation risks, the skill and quality of work performed, and the contingent nature of the representation,⁸ Ninth Circuit authority supports an upward adjustment from the 25% benchmark here. Stephens' reliance on average fee awards in other cases is

⁸ Stephens argues this factor is obsolete based on the Ninth Circuit's decision 2011 decision in *Bluetooth*. Stephens Obj. at 24. The Ninth Circuit has subsequently reaffirmed the relevance of "delays in payment inherent in contingency-fee cases," which allows for enhancements to historical hourly rates (which were used here) or current rates for all hours. *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016); *see also Stetson v. West Publishing Corp.*, 714 Fed.App'x 681, 682 (9th Cir. Oct. 30, 2017) ("[t]he district court erred by failing to update the lodestar calculation to compensate for the delayed payment").

contrary to the Ninth Circuit’s directive to consider the circumstances of the case at issue and the work performed to achieve the results. And as to the lodestar cross-check, Stephens misses the point that a cross-check is not a forensic exercise but a discretionary and “quick” means for the Court to confirm the reasonableness of the fee award, *In re Online DVD-Rental Antitrust Litig.*, 779 F. 3d 934, 955 (9th Cir. 2015), and requires “entail neither mathematical precision nor bean counting,” *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264 (N.D. Cal. 2015). Moreover, Stephens’ proposed adjustments are neither well-founded nor would they change the ultimate conclusion that the requested fee is reasonable. Overall and considering the facts of this case and the work performed, Stephens offers no convincing reason why a 30% fee award would be a “windfall,” much less why an award of a mere 15% would be warranted.

A. Stephens’ Challenges to the Percentage Fee Award Are Unfounded

Class Counsel and Stephens agree that the Court has a duty to ensure that fee awards are reasonable and do not result in a windfall to class counsel to the detriment of the class. *See* Stephens Obj. at 2-3. As discussed below, consideration of the relevant Ninth Circuit factors supports the requested fee award in this case.

1. There is No Rule in the Ninth Circuit that Percentage Awarded Should Decrease as the Size of the Settlement Increases

Stephens contends that a 15% fee award is warranted “based on the size of the settlement fund.” Stephens Obj. at 4. Looking to nothing other than the size of the settlement is at odds with Ninth Circuit precedent, however. The Ninth Circuit has repeatedly emphasized that the size of the settlement fund is *one factor* among many that courts are to consider when analyzing a fee request. *Vizcaino v. Microsoft Corporation*, 290 F.3d 1043, 1047 (9th Cir. 2002). The size of the fee award should be based on whether “circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors.” *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). Relevant factors include: “(1) the result achieved; (2) the risk involved in the litigation; (3) the skill required and quality of work by counsel; (4) the contingent nature of the fee; and (5) awards made in similar cases.” *Larsen v. Trader Joe’s Co.*, 2014 WL 3404531, at *9 (N.D. Cal. July 11, 2014) (citing *Vizcaino*, 290 F.3d at 1048-50). This multifactor approach is

1 necessary to prevent arbitrary fee awards that are either too high or too low.

2 **a) A Formulaic Fee Analysis is Contrary to Ninth Circuit Precedent**

3 Stephens does not mention or engage with the relevant factors or Class Counsel’s discussion of
4 them. Instead, he asks this Court to ignore decades of Ninth Circuit law and employ what Stephens
5 describes as the “better approach”: basing the fee award on academic surveys of what happened in *other*
6 cases. Stephens Obj. at 5-7.⁹ Stephens bases his proposed 15% fee award on what he describes as
7 “empirical evidence and circuit practice” regarding awards in other cases, rather than the facts of this
8 case. Stephens Obj. at 8.

9 The Ninth Circuit has cautioned against the formulaic approach Stephens advocates for, because
10 “courts cannot rationally apply any particular percentage—whether 13.6 percent, 25 percent or any other
11 number—in the abstract, without reference to all the circumstances of the case.” *In re Wash. Pub. Power*
12 *Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1298 (9th Cir. 1994). To be sure, a district court “must refer” to
13 the size of the fund, but the Ninth Circuit has declined to “adopt a bright-line rule requiring the use of
14 sliding-scale fee awards for class counsel in megafund cases” that dictates a downward adjustment as
15 the settlement size increases. *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 933 (9th
16 Cir. 2020); *see also Toyota*, 2013 WL 12327929, at *34 (“no rule in the Ninth Circuit [] requires a court
17 to decrease the percentage of the fee award as the size of the settlement increases”) (citing *Vizcaino*, 290
18 F.3d at 1047). Stephens’ argument for a “strong presumption against the benchmark, in favor of
19 downward departure” (Stephens Obj. at 7) ignores controlling Ninth Circuit authority and “flies in the
20 face” of a court’s obligation to “consider[] all the circumstances of the case and reach[] a reasonable
21 percentage.” *Vizcaino*, 290 F.3d at 1048. The Court should decline Stephens’ invitation to disregard
22 Ninth Circuit precedent.

23 Stephens argues that larger settlements do not always require more work than smaller ones.
24 Stephens Obj. at 4. Whatever the validity of that principle as a general matter, it is inapposite here. As
25 discussed below, overcoming the risks inherent in this case took both significant work and creative
26

27 ⁹ Although Stephens argues that a district court’s assessment of the appropriate fee is nondelegable
28 (Stephens Obj. at 10, 17), at the same time, he suggests that courts should simply apply the results of
academic surveys.

lawyering. Numerous strategic decisions by Class Counsel paved the way for successful oppositions to dispositive motions, claims against the Released Parties, a nationwide claim with joint and several liability, and certification of multiple classes even though certification had been almost universally denied in tobacco products litigation. *See* Section III.A.2.a. These successes, combined with the factual and expert evidence developed by Class Counsel, created the litigation value that ultimately drove the JLI Settlement. If the size of the class alone determined the settlement amount, then this case would have resolved years ago. Instead, it took years of litigation to reach settlement as the parties were preparing for trial.

b) Surveys Averages Are Not Instructive in this Case

The averages reflected in the surveys Stephens relies on reveal nothing about the facts and circumstances in this case. The “empirical evidence” Stephens relies on does not, for example, provide information about whether cases assessed had certified classes, dealt with potentially dispositive preemption issues, involved defendants in precarious financial straits, required unique legal theories, or other key considerations that may inform the reasonableness of a fee award in a particular case.

While Stephens cites a small handful of cases that have found surveys informative, courts have rejected surveys in favor of a case specific approach. *See, e.g., In re: Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 721680, at *43 (N.D. Cal. Jan. 28, 2016) (noting existence of surveys but recommending upward adjustment from the benchmark to 30% of \$173 million settlement), *report and recommendation adopted in part, In re: Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 4126533, at *6 (N.D. Cal. Aug. 3, 2016) (awarding 27.5% fee); *Rodman v. Safeway Inc.*, 2018 WL 4030558, at *5-6 (N.D. Cal. Aug. 22, 2018) (cited by Stephens, the court examined the same surveys Stephens offers here and awarded fees totaling 28% of the recovery); *see also Heekin v. Anthem, Inc.*, 2012 WL 5878032, at *2 (S.D. Ind. Nov. 20, 2012) (acknowledging surveys but noting that they “do not replace the analysis” for determining a reasonable fee); *Hale v. State Farm Mut. Auto. Ins. Co.*, 2018 WL 6606079, at *11 (S.D. Ill. Dec. 16, 2018) (similar).

The authors of one survey that Stephens cites underscored the need to consider the circumstances of each case, finding in a different study that a 33% fee is reasonable in contingent cases that proceed to trial. *See In re: Urethane Antitrust Litig.*, 2016 WL 4060156, at *5 & n.5 (D. Kan. July 29, 2016) (citing

Theodore Eisenberg and Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical L. Stud. 27, 35 (2004), and awarding one-third of \$835 million settlement); *see also In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1115 n. 11 (D. Kan. 2018) (noting that the author of a different study Stephens cites, Professor Brian Fitzpatrick, stated in a declaration in the *Deepwater Horizon* case that “that he (like many courts and commentators) ‘do[es] not endorse this bigger-settlement-smaller-fee approach because it creates bad incentives for class counsel.’”) (alteration in original). Stephens argues that courts “rely on [] empirical surveys as a matter of course.” Stephens Obj. at 7. But in none of the cases Stephens cites did the court mechanically apply survey results without analysis of whether the award was appropriate given the circumstances of the case.¹⁰

c) The Cases Class Counsel Cite Confirm the Reasonableness of the Requested Fee Award

Stephens argues that Class Counsel’s fee request is based on the “cherry picked” cases that Class Counsel cites. Stephens Obj. at 5. The cases Class Counsel cites are not “outliers,” however, as even in the context of large settlements, courts have “routinely awarded class counsel fees in excess of the 25% ‘benchmark.’” *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 2017 WL 6040065, at *5 & n.30 (N.D. Cal. Dec. 6, 2017), *aff’d*, 768 F. App’x 651 (9th Cir. 2019); *see also In re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at *2-4 (N.D. Cal. Sept. 20, 2018) (fee award of 33.3% of \$104.75 million settlement); *Benson v. DoubleDown Interactive, LLC*, 2023 WL 3761929, at *3 (W.D. Wash. June 1, 2023) (awarding 29.3% fee on a \$415 million settlement fund); *In re TFT-LCD (Flat*

¹⁰ *See In re Yahoo! Inc. Customer Data Security Breach Litig.*, 2020 WL 4212811, at *37-38 (N.D. Cal. July 22, 2020) (court principally applied the lodestar method, and discussed the “circumstances” of the case when performing a percentage-of-recovery crosscheck); *In re High-Tech Employee Antitrust Litig.*, 2015 WL 5158730, at *9-11 (N.D. Cal. Sept. 2, 2015) (principally applying the lodestar method, and awarding a 2.2 multiplier); *Alexander v. FedEx Ground Package System, Inc.*, 2016 WL 3351017, at *2-3 (N.D. Cal. June 15, 2016) (applying the lodestar method and reducing the fee award to a 3.0 multiplier after finding that circumstances did not warrant a 4.0 multiplier); *In re Wells Fargo & Co. Shareholder Derivative Litig.*, 445 F. Supp. 3d 508, 526 (N.D. Cal. 2020) (holding that the “studies’ ‘data does not replace the 25 percent benchmark, nor does it negate the positive factors assessed above’”) (quoting *Rodman v. Safeway Inc.*, 2018 WL 4030558, at *5 (N.D. Cal. Aug. 22, 2018)); *Nitsch v. DreamWorks Animation SKG Inc.*, 2017 WL 2423161, at *10-12 (N.D. Cal. June 5, 2017) (applying the lodestar method and, with respect the percentage crosscheck, finding that the “‘economies of scale’ effect is especially relevant in the instant case” based on the specific facts of the case).

1 *Panel) Antitrust Litig.*, 2011 WL 7575003, at *1 (N.D. Cal. Dec. 27, 2011) (approving 30% fee award of
 2 \$405 million settlement). And more to the point, the cases Class Counsel cite don't provide the basis for
 3 the requested award; instead, the fee request here is based on the relevant Ninth Circuit factors as
 4 applied to *this case*: the results achieved, the significant litigation risks undertaken, the skill and quality
 5 of work performed by counsel, and the contingent nature of the work performed. Fee and Expense Mot.
 6 at 7-11. Only one paragraph in the Fee and Expense Motion discusses cases involving fee awards in
 7 excess of 25%, and the point of that paragraph is to emphasize that a 30% award is “within the range of
 8 awards in similar cases” (Fee and Expense Mot. at 11)—an assertion that Stephens does not contest.

9 The arbitrariness and dangers of Stephens' approach are obvious. He conducts *no analysis* of
 10 whether the requested fee award would result in a windfall *in this case*. While some “megafund” cases
 11 in this Circuit have resulted in fee awards below the 25% benchmark, those cases frequently involved
 12 substantial lodestar multipliers. It was courts' desire to avoid an even higher multiplier—not reliance on
 13 surveys or a wholesale rejection of the 25% benchmark in megafund cases—that drove the results in
 14 those matters. Stephens repeatedly cites, for example, *In re Facebook Biometric Information Privacy*
 15 *Litigation*. 522 F. Supp. 3d 617 (N.D. Cal. 2021). But in *Facebook*, a 25% fee award would have
 16 resulted in a 5.3 multiplier. *Id.* at 633. The court entered an order awarding fees at a multiplier of 4.71.
 17 As discussed below, any calculation of counsel's lodestar in this case leads to a multiplier significantly
 18 less than 4.71.

19 Adoption of Stephens' approach will also lead to untenable results: courts would award the
 20 “average” fee percentage regardless of whether the circumstances warranted a different outcome. Class
 21 counsel could receive an unreasonable award based on the work performed to achieve the result in a
 22 particular case. This Court's decision in *Lidoderm* provides an illustrative example. There the recovery
 23 was \$104.75 million, and the Court awarded \$34.9 million in fees, which was one-third of the settlement
 24 fund and a 1.37 multiplier. 2018 WL 4620695, at *1-2. Had the Court arbitrarily held that a 15% fee was
 25 appropriate based on Stephens' rationale, the fee award would have represented a .62 negative
 26 multiplier, a manifestly unjust result given the recovery and complexity of that matter.

27 The Court should reject Stephens' invitation to depart from well-settled Ninth Circuit law and
 28 arbitrarily set fees in this matter based on average awards in other cases. It should instead be guided by

the specific considerations of this case, as dictated by Ninth Circuit precedent. Stephens’ objection provides “no availing reason why the Court should reduce attorneys’ fees in *this* action” and the Court should “therefore reject[] as entirely unreasonable [the] dogmatic objection to counsel’s fee award in this action.” *City of Livonia Employees’ Ret. Sys. v. Wyeth*, 2013 WL 4399015, at *5 (S.D.N.Y. Aug. 7, 2013) (emphasis in original).

2. Stephens’ Contention That This Litigation Was Low-Risk and Based on Government Investigations Is Counter-Factual

Stephens argues that counsel faced no risk due to government investigations and litigation. He ignores the unique risks this case posed, as well as the challenges inherent to the class claims—none of which were or could have been alleviated by government enforcement actions.

a) Class Counsel Overcame Significant Risks

The Initiation of the Lawsuit: According to Stephens, JLI was a well-funded corporation and plaintiffs’ counsel, seeing an obvious payday, piled on with lawsuits. Stephens Obj. at 19-20. The truth is that JLI was a startup company whose long-term financial condition was uncertain, and whose financial viability relied on contributions from its key investors and a desire to seek *future* investments from a large tobacco company. By the time MDL leadership had been appointed in late 2019, JUUL’s popularity had peaked and JLI’s financial prospects had deteriorated significantly against headwinds of lawsuits, subpoenas, investigations, and public outcry. Sharp Reply Decl., ¶ 21 & Ex. 2 (citing NYT, *How Juul Hooked a Generation in Nicotine*). Of Altria’s \$12.8 billion investment in JLI in late 2018, less than \$200 million was retained by the company, with the vast majority of the Altria money having been paid out to stakeholders and employees. Sharp Decl., ¶ 14. JLI’s fate rested in large part in the FDA’s hands. Sharp Reply Decl., ¶ 22. These facts were known when Class Counsel committed to this risky case. *Id.* That risk came to fruition: the FDA’s denial of JUUL’s PMTA in late June 2022 meant bankruptcy was widely anticipated. *Id.* By July 2022, having already recorded a series of write-downs on its initial investment, Altria further wrote its investment in JLI down to a mere \$450 million, which was below the threshold for Altria to exit a noncompete agreement and invest in other ENDS products. *Id.* The consequences for JLI—teetering at the edge of bankruptcy as it was—could have been devastating.

1 That a number of law firms sought leadership positions in the case is no reason to conclude that
 2 the litigation was riskless either. Stephens Obj. at 20, 24. Stephens relies heavily on the *In re Anthem,*
 3 *Inc. Data Breach Litigation*, where the court noted that while many firms sought leadership
 4 appointments, “the risks attendant to maintaining [the] litigation weigh in favor of granting Class
 5 Counsel’s request for a fee award of more than 25%.” 2018 WL 3960068, at *13 (N.D. Cal. Aug. 17,
 6 2018). In general, many class cases draw leadership applications from a wide variety of counsel. At the
 7 same time, many of those cases turn out poorly—the class is not certified or loses on the merits. The
 8 assumption that a large number of applications means no risk does not reflect the reality of contingent
 9 litigation.

10 ***Nationwide RICO Claim:*** The reality of JLI’s financial condition made it crucial to establish,
 11 maintain, and certify claims against the Directors. Plaintiffs alleged that it was they who controlled JLI,
 12 and they who took most of Altria’s money out of the company. Those claims were difficult: as this
 13 Court’s motion to dismiss opinions recognized, suing a company’s managers is not the norm, and
 14 requires difficult showings of personal involvement and active control. Those claims gave the Class
 15 significant leverage it would not otherwise have. Sharp Reply Decl., ¶ 23. As important, it made
 16 bankruptcy a less palatable option because such a move would have left the Directors at risk of (1) their
 17 own liability remaining after insolvency proceedings ended or (2) their payments from Altria being
 18 clawed back. *Id.* Maintaining the case against the Directors required developing legal theories and
 19 causes of action that could be asserted against them. *Id.* Class Plaintiffs’ claim under the Racketeer
 20 Influenced and Corrupt Organizations Act (“RICO”) (18 U.S.C. § 1962) not only provided a claim for
 21 joint and several liability against the Directors, it also allowed Class Plaintiffs to assert a nationwide
 22 claim instead of relying on a series of state-specific bellwethers. *Id.* The presence of this nationwide
 23 claim created exponentially higher risks for the Directors at trial. *Id.*

24 Framing a RICO claim was difficult, and there was a substantial risk it would not survive. The
 25 Ninth Circuit applies a heightened standard of review for RICO allegations. *See Wagh v. Metris Direct,*
 26 *Inc.*, 348 F.3d 1102, 1108 (9th Cir. 2003) quoting *Figueroa Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir.
 27 1990) (explaining courts should “‘strive to flush out frivolous RICO allegations at an early stage of the
 28 litigation’” given the “consequent ‘stigmatizing effect on those named as defendants’”), *overruled on*

1 *other grounds, Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir. 2007). The Court initially
 2 dismissed Class Plaintiffs' RICO claims against all Defendants. Dkt. 1084. One month later, Class
 3 Plaintiffs filed an amended complaint, recasting their RICO claims and adding allegations regarding the
 4 conduct of Altria and the individual Defendants. Dkt. 1135. After a second round of motion to dismiss
 5 briefing, the Court upheld the claims, stating: "Plaintiffs assert a plausible theory to maintain their RICO
 6 claims against Altria and the Founder and Director Defendants." Dkt. 1694 at 1. The Court warned that
 7 the viability of Plaintiffs' RICO enterprise theory, as well as whether the RICO Defendants were
 8 pursuing enterprise goals outside of JLI's ordinary course of business, could be revisited at summary
 9 judgment. *Id.* at 13.

10 It bears emphasis: if Stephens' narrative of a corporate defendant flush with cash and eager to
 11 settle was accurate, then there was no point to the RICO claim that dominated this litigation. JLI *was not*
 12 *even named in the RICO claim* that survived the motion to dismiss. The reason the parties and the Court
 13 dedicated such resources to that claim was the crucial importance of the claims against the Directors and
 14 Altria. Stephens does not acknowledge those claims, let alone explain how they are consistent with his
 15 portrayal of this litigation as low-risk.

16 ***Class Certification:*** As detailed in the Fee and Expense Motion, class certification has been
 17 almost universally denied in cases asserting claims involving tobacco products, leading Defendants to
 18 argue "that no class of purchasers of nicotine or other addictive products could ever be certified." *In re*
 19 *JUUL Labs, Inc. Mkt'g, Sales Pracs., and Prods. Liab. Litig.*, 609 F. Supp. 3d 942, 969 (N.D. Cal.
 20 2022). This trend of class certification denials was so well-known that Class Counsel recognized the
 21 need to proactively address it. *See* Dkt. 1772-2 at 42-45 (Class Certification Motion) (citing cases that
 22 have denied class certification, *e.g.*, *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008); *In re*
 23 *NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050 (C.D. Cal. 2015); *Phillips v. Philip*
 24 *Morris Companies, Inc.*, 298 F.R.D. 355 (N.D. Ohio 2014); *In re Light Cigarettes Mkt'g Sales Pracs.*
 25 *Litig.*, 271 F.R.D. 402 (D. Me. 2010); *Cleary v. Philip Morris USA, Inc.*, 265 F.R.D. 289 (N.D. Ill.
 26 2010)). Certifying RICO claims also presents significant challenges: as McLaughlin on Class Actions
 27 recognizes, "[d]espite the ease with which commonality is satisfied in most RICO actions, individual
 28 issues of elements such as reliance, causation and proof of damages frequently predominate in putative

RICO class actions and prevent certification.” 1 McLaughlin on Class Actions § 4:13 (19th ed.); *see also* 2 *In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Pracs. Litig.*, 277 F.R.D. 586, 609 (S.D. Cal. 2011) 3 (denying motion to certify nationwide RICO claims because individual issues predominated regarding 4 racketeering activity element). The Court certified other claims that typically do not survive, or are not 5 even asserted, in other cases: application of a conjoint model to non-labeling claims and a full refund 6 model of damages for youth purchasers. At class certification, nationwide damages stemming from the 7 conjoint model exceeded \$1 billion and the full refund youth damages were several hundred million in 8 additional potential damages. And underscoring the challenges and risks of obtaining certification, the 9 Ninth Circuit granted Defendants’ Rule 23(f) petitions, which often leads to the reversal of the 10 underlying certification decision. *See* Sharp Decl., Ex. 2 (Klonoff Decl.) at 21-22 (discussing Rule 23(f) 11 appeal reversal rates).

Class certification in this case, therefore, did not happen on its own. As the Court recognized, the 12 “legal theories” and “expert support provided by plaintiffs that was missing in [other tobacco 13 litigations]” led the Court to certify the classes (Dkt. 3327 at 18) and a favorable resolution. In 14 particular, Class Counsel presented credible experts opinions on classwide exposure to products 15 marketed through social media (Professor Chandler), the consistency of marketing messages (Dr. 16 Pratkanis), and the common nature of abuse liability (Dr. Shihadeh). Class Counsel is aware of no other 17 case with similar experts, and these novel approaches were key to overcoming the previously 18 insurmountable risks at class certification. Stephens ignores both the class certification risks and Class 19 Counsel’s efforts to overcome them. The risks materialized in other cases, such as ones relied on by the 20 Court in its class certification order. *See Freitas v. Cricket Wireless, LLC*, 2022 WL 3018061 (N.D. Cal. 21 July 29, 2022) (decertifying class); *Earl v. Bowling Co.*, 53 F. 4th 897 (5th Cir. 2022) (same). And of 22 course, these risks were faced solely by the class action, and not by any government enforcement action. 23

Tobacco Litigation: Aside from the certification challenges, litigation against the tobacco 24 industry is notoriously hard-fought, and this case was no different. *See generally United States v. Philip* 25 *Morris, Inc.*, 449 F. Supp. 2d 1, 28 (D.D.C. 2006) (discussing history); *In re Tobacco II*, 240 Cal. App. 26 4th 779, 785-87 (2015) (after eighteen years of litigation, denying restitution from Philip Morris due to 27 lack of competent economic evidence, despite tobacco company’s advertising violations of UCL and 28

FAL); *Kurzweil v. Philip Morris Cos.*, 1999 WL 1076105, at *1-2 (S.D.N.Y. Nov. 30, 1999)) (because tobacco cases are so aggressively defended and plaintiffs’ success rate is so low, the risk factor supported a 30% fee award of \$123 million settlement). The defendants here have been represented by some of the most successful firms and lawyers in the country that specialize in tobacco litigation: Kirkland & Ellis LLP; Munger, Tolles & Olson LLP; Arnold & Porter Kaye Scholer LLP; Wilkinson Stekloff LLP; Kellogg, Hansen, Todd, Figel & Frederick PLLC; Orrick Herrington & Sutcliffe LLP; and Boersch & Illovsky LLP. Succeeding against such highly-qualified counsel and well-funded defendants required an enormous investment of time and energy by Class Counsel. *See In re Broiler Chicken Antitrust Litig.*, 2022 WL 6124787, at *3 (N.D. Ill. Oct. 7, 2022) (granting 33% fee award in part because “Plaintiffs have been opposed by many defendants, including a number of very large and well-funded corporations, which have retained some of the most prominent and sophisticated law firms in the United States”).

b) Government Investigations and Litigation Did Not Decrease the Risk to Class Counsel; if Anything, They Increased It

Stephens also asserts that this was “relatively low-risk litigation” in large part because it purportedly “substantially benefitted from parallel government investigations.” Stephens Obj. at 1, 7. This superficial account relies on federal policy statements on youth e-cigarette use generally, an FDA letter requesting information from JLI, and various state attorney general actions to somehow make the \$255 million class settlement an inevitable outcome. According to Stephens, years of adversarial litigation (at astonishing expense to both sides) were largely a pretext to eventually justify a fee.

Class Counsel in this case cannot “be cast as jackals to the government’s lion, arriving on the scene after some enforcement or administrative agency has made the kill.” *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 597 (S.D.N.Y. 1992) (awarding 30% as “eminently reasonable”). The record and the facts in this litigation, unlike Stephens’ assumptions, confirm that Class Counsel “did all the work on their own.” *Id*; *see also In re: Volkswagen “Clean Diesel” Mkt., Sales Prac., & Prods. Liab. Litig.*, 2017 WL 1474312, at *4 (N.D. Cal. Apr. 24, 2017) (rejecting similar argument even where, unlike here, government agencies litigated the case in tandem with private counsel and the settlement was tied to multiple consent decrees). *Cf. In re Petrobras Sec. Litig.*, 317 F. Supp. 3d 858, 876-77

(S.D.N.Y. 2018) (awarding 1.78 multiplier on lodestar-based fees due to “risk of non-recovery” even where “much of the work that might otherwise have been required of plaintiffs’ counsel had already been done, and done in a way that enhanced plaintiffs’ bargaining position.”).

i. The FDA’s Actions Increased Litigation Risk

The FDA’s ongoing regulation of JUUL made Class Counsel’s job more risky, not less. The FDA’s policy of deferred enforcement of the PMTA requirement meant that, at any time, the FDA could have ordered JUUL products off the market, as the FDA threatened to do. *See* Statement from FDA Commissioner Scott Gottlieb, M.D., on New Steps to Address Epidemic of Youth E-Cigarette Use (Sept. 11, 2018) (threatening to “revisit the FDA’s exercise of enforcement discretion for products currently on the market”).¹¹ Such FDA action would have forced JLI into bankruptcy, threatening little or no return to the Class, and to Class Counsel.

What the FDA *did* do created risk too. FDA enforcement policy and the PMTA process were the bases for a motion to stay this litigation indefinitely on the grounds of primary jurisdiction (a stay that, if granted, would still be in place today). *See* Dkt. 1084 at 10-17 (denying stay). Even more significant, the FDA’s exercise of regulatory authority over ENDs supported a colorable motion to dismiss *all* of the Class claims as preempted. *See id.* at 18-33. While Class Counsel defeated that motion in significant part, preemption cast a pall through certification and would have continued to pose risks at summary judgment and trial. Most obviously, the Court repeatedly emphasized that its ruling would be revisited if and when the FDA issued a determination on JLI’s PMTAs. *Id.* at 15. The potential for greater, or even complete, preemption of the Class claims was always present—from inception onward.

Moreover, the Court’s determination that “labelling claims based on nicotine addiction are preempted,” *id.* at 25, exempted from liability the most potent and regularly certified form of false advertising: crucial omissions via the medium guaranteed to reach consumers. *See Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1099 (N.D. Cal. 2018) (explaining that class certification is easier in labelling cases because “[e]xposure to statements displayed on the outside of a product’s packaging is clearly more likely”). No doubt, at summary judgment and trial Defendants would have argued both that

¹¹ Available at <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-steps-address-epidemic-youth-e-cigarette-use>

(1) the addiction warning made any advertising misrepresentations immaterial and (2) that preemption principles precluded false advertising claims that required the jury to evaluate the effectiveness of the federal warning. *See Critcher v. L'Oreal USA, Inc.*, 959 F.3d 31, 36 (2d Cir. 2020) (finding claims preempted where their premise was that “compliance with” the federal warning “has the effect of making the packaging misleading”). In the *SFUSD* trial, Altria maintained credible arguments based on the Court’s preemption order through the motion in limine stage, *see* Dkt. 3901 at 2; no doubt all Defendants would have done the same in the Class trial.

ii. The Class Case Was Not Based on FDA Findings

Stephens’ claim that “[t]he FDA ... laid out the essence of Plaintiff’s case before the first class complaint was even filed” is unsupported. Dkt. 4063 at 23 n.14. To start, this argument relies on a September 9, 2019, warning letter that was sent 17 months *after* the first class complaint was filed. Moreover, this letter concerned whether JUUL was marketed as a modified risk tobacco product, *i.e.*, whether JUUL products are “safer than cigarettes.” FDA, Warning Letter to Juul Labs, Inc. (Sept. 9, 2019).¹² The Class claims, by contrast, focused on specific deceptive conduct that had nothing to do with whether JUUL was a modified risk product or the specific affirmative statements that triggered the FDA’s concern.

In particular, the Class alleged that JUUL marketing failed to disclose material information concerning the products’ addictiveness and potential for adverse health effects that were material to purchasing decisions. These claims were painstakingly developed through discovery and consultation with industry experts, and not based on FDA letters. Among other things, Class Counsel had to develop a deep understanding of the features of JUUL Products that contribute to their addictiveness and risk of personal injury. Only a portion of the fraud claims involved comparisons of JUUL and cigarettes, and the Court dismissed the most potent of those claims (based on omissions on the product label). Beyond these deceptive marketing claims, Class Plaintiffs also argued that JUUL marketing targeted minors. FDA warning letters therefore did not, and could not, provide a basis for liability. In fact, warning letters like this were relied on by Defendants as a basis to *deny* class certification, and so, if anything, *added*

¹² <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/juul-labs-inc-590950-09092019>

1 risk to Class Counsel’s efforts. *See* Dkt. 2309-2 at 17 (citing “government and public scrutiny” and the
 2 “resulting” variation in “risk perception of JUUL Products”) (capitalization omitted); Dkt. 2309-3 at 7-8
 3 (arguing that increasing “regulatory scrutiny” refuted Plaintiffs’ experts common causation opinions).

4 **iii. Class Counsel Did Not Rely on State AGs**

5 Stephens claims that the class litigation rode “in the slipstream” of the state attorney general
 6 investigations and litigation. Stephens Obj. at 1. This is false.

7 ***State AG Litigation Trailed the MDL.*** *Colgate* was filed in April 2018, and the MDL was
 8 formed on October 2, 2019. By the time the first AG complaint was even filed (California—November
 9 18, 2019), this Court had (1) overseen initial class-wide discovery in *Colgate*; (2) adjudicated two
 10 motions to dismiss in *Colgate*; (3) ordered an initial MDL census, Dkt. 193; and (4) appointed co-lead
 11 counsel, Dkt. 250. Meanwhile, class-wide discovery, which had begun in *Colgate*, continued in the
 12 MDL. Dkt. 291 at 2. The remaining state AG complaints trickled in over the ensuing months and years
 13 as lawyers in this MDL conducted comprehensive fact and expert discovery and certified the classes.

14 Stephens opines on one hand that the Court must consider only a myopic view of the risk this
 15 litigation posed the day *Colgate* was filed. Stephens Obj. at 22.¹³ On the other hand, he urges the Court
 16 to find a lack of risk based on state AG complaints filed long after this MDL was in full swing, and
 17 years after *Colgate* initiated the class claims. *Id.* at 23 (discussing Arizona, New Mexico, Colorado, and
 18 Washington complaints).

19 ***Class Counsel, not AGs, Developed and Litigated this Case.*** Class Counsel obtained and
 20 reviewed their own documents, took their own depositions, retained and presented their own experts,
 21 created their own damages models, and certified their own classes. *See* Sharp Reply Decl., ¶ 3. AGs did
 22 none of that work, all of which carried significant risks.¹⁴ *See id.*, ¶¶ 3–4. Stephens selects a few

23 _____
 24 ¹³ This argument cites Seventh Circuit authority, but, as Stephens does not acknowledge, that Circuit
 25 employs a “market rate” approach to calculating fees that is not the law of the Ninth Circuit. *Vizcaino*,
 26 290 F.3d at 1049. In any event, the excessive focus on a particular date makes no sense: later-in-time
 27 events (like JLI’s PMTA being denied) can help to determine that ex ante risk was real and significant.

28 ¹⁴ This distinguishes this case from *Petrobras*, 317 F. Supp. 3d at 876-77, where “much of the work that
 might otherwise have been required of plaintiffs’ counsel had already been done, done in a way that
 enhanced plaintiffs’ bargaining position.” As noted above, *Petrobras* found a risk multiplier warranted
 in any event.

1 paragraphs from an amended complaint to make it look like the key allegations in this case were based
 2 on AG findings. Stephens Obj at 23-24. In reality, the 649-page Consolidated Class Action Complaint
 3 (Dkt. 386-4) was almost entirely based on review of the hundreds of thousands of documents produced
 4 in *Colgate* and here—as evidenced by the 131 paragraphs and 21 footnotes that required redactions.
 5 Sharp Reply Decl., ¶ 13. In particular, the subsequent amended complaints—which set out the factual
 6 basis for the Director liability that drove resolution—were based on tireless analysis of documents
 7 produced in this litigation, as well as groundbreaking legal theories, not cribbing from anyone else’s
 8 work. *See id.*

9 MDL counsel secured a volume of discovery that vastly exceeded the discovery produced to
 10 government investigators. *Id.*, ¶ 7. From an early stage in this MDL, Plaintiffs had standing discovery
 11 requests for documents produced to government agencies. *Id.*, ¶ 5; *see* Dkt. 291 at 2; Dkt. 397 at 3-4.
 12 But this limited universe was not even close to sufficient to certify the classes and prove liability and
 13 damages. Instead, Plaintiffs served (on JLI alone) hundreds of additional requests for production, and
 14 served more than 190 third-party subpoenas, spent months negotiating independent sets of search terms,
 15 and obtained documents from dozens of additional custodians. Sharp Reply Decl., ¶ 5.

16 In particular, Plaintiffs doggedly pursued custodial discovery that the AGs never did. *Id.* While
 17 JLI maintained a limited list of search terms used for AG/regulator productions, in the MDL Plaintiffs
 18 spent months negotiating a sweeping list of hundreds of search terms to ensure comprehensive discovery
 19 beyond the limited amount produced in the AG litigations. *Id.*, ¶ 6. The same was true of custodians and
 20 sources of information: Plaintiffs negotiated dozens of additional custodians and sources, including
 21 crucial Slack messages. *Id.*, ¶ 7; *see* Dkt. 672 at 8-9 (discussing Slack); Dkt. 904 at 11 (discussing
 22 additional custodians); *cf.* Sharp Reply Decl., ¶ 7 & Ex. 1 (JLI refused to produce complete Slack data to
 23 the North Carolina AG even after a motion to compel was granted on April 30, 2021). Due to these
 24 efforts, MDL counsel secured critical evidence that AGs did not, or could not, acquire. Plaintiffs, not
 25 AGs, for example, secured production of JLI’s PMTA and all communications with the FDA, Dkts.
 26 1036, 1999 (granting motions to compel). Each production went well beyond what State AGs were
 27 willing or forced to accept. *See* Dkt. 1022 at 6 (JLI arguing for significantly reduced productions on the
 28 basis that “two State Attorneys General[] agree that [JLI’s proposed] compromises [avoid] infringing on

1 JLI's ongoing PMTA-related work or invading the FDA's exclusive authority over the standards for
2 marketing and labeling of JUUL products.”).

3 The scope of depositions in this case likewise went far beyond what any AG did. Consider
4 *Minnesota v. Juul Labs, Inc.*, No. 19-19888 (Minn. Distr. Ct.), the only AG action to go to trial. In that
5 trial, the AG presented testimony from five defense witnesses—Murray Garnick, Nicholas Pritzker,
6 Christopher Olin, Adam Bowen, and James Monsees. Sharp Reply Decl., ¶ 10. *All* of those witnesses
7 testified at the Minnesota trial via *depositions taken in the MDL. Id.* By contrast, of the 16 witnesses
8 whose video depositions were played during the *SFUSD* trial against Altria (which required a prove-up
9 of the same RICO conspiracy at issue in the Class case), every single deposition was taken in the MDL.
10 *Id.*, ¶ 9. And the North Carolina AG, whose case settled on the eve of trial, deposed only one of those
11 witnesses in its own case. *Id.* The bigger picture: Plaintiffs—through years of disciplined, hard, effective
12 work—secured the discovery they needed from defendants; Plaintiffs did not (and could not have) rested
13 on their laurels, waiting for the AGs to do their work for them. The North Carolina AG, for example,
14 claimed that JLI ignored orders granting motions to compel, failed to respond to certain discovery
15 requests and then, shortly before trial, produced millions of documents, “much of which [were] almost
16 assuredly non-responsive,” placing on the government litigators “the Herculean task of reviewing these
17 three million documents four weeks before trial.” *Id.*, ¶ 7 & Ex. 1. None of that happened here because
18 Class Counsel were persistent in pursuing discovery and presenting disputes to Judge Corley. As a
19 result, for example, Plaintiffs secured production of nearly 1,000,000 pages of additional documents
20 (including the FDA communications) after the North Carolina AG case had concluded. *Id.*

21 ***The MDL Was Solely Responsible for the Crucial Litigation Against the Directors.*** It was
22 Class Counsel, not AGs, who established and successfully prosecuted the novel Director claims that, as
23 discussed above, gave the Class its settlement leverage. This is no knock on the AGs: their mission is
24 enforcement and deterrence and so, for most, JLI was the primary target. But Class Counsel had a duty
25 to secure compensation for the Class; to do that, they had to go far beyond what any AG did.

26 Apart from one terse personal injury complaint in the JCCP, the first complaints in the country to
27 name a Director as a Defendant were the Class and other master complaints filed in this case in early
28 2020. The few AGs that later sued the Directors did so only in the wake of this MDL establishing the

1 factual bases for individual liability. For example, North Carolina (one of the most aggressive JUUL AG
 2 litigants) did not sue the Directors until November 16, 2021, and then did so almost entirely *the MDL*
 3 *complaints*. Sharp Reply Decl., ¶ 16.¹⁵ Other AGs failed where Class Counsel succeeded. *See State ex*
 4 *rel. Weiser v. Juul Labs, Inc.*, 517 P.3d 683, 695 (Col. 2022) (dismissing claims against Directors and
 5 rejecting this Court’s reasoning); *People ex rel. James v. Juul Labs., Inc.*, 2022 WL 2757512, at *3-6
 6 (N.Y. Sup. Ct. July 14, 2022) (same); *People v. JUUL Labs, Inc.*, No. RG19043543 (Cal. Super Ct. Oct.
 7 19, 2022) (filed at Doc. 3631-1) (same, as to Dr. Huh). Yet another AG *did* keep alive claims against the
 8 Directors—but that AG was represented by MDL co-lead counsel, who relied on the MDL work product
 9 in drafting the complaint and prosecuting the litigation. *Hawai’i v. Juul Labs, Inc.*, No. 20-933 (Haw.
 10 Cir. Ct. May 10, 2021).

11 The unique focus on the Directors—essential to the Class case; more of a footnote for the AGs—
 12 was reflected in discovery. Plaintiffs obtained document productions from Mr. Pritzker, Mr. Valani, and
 13 Dr. Huh; as far as Class Counsel is aware, Plaintiffs were the first, and possibly the only, litigants to do
 14 so. Sharp Reply Decl., ¶ 15. In all events, the documents Plaintiffs obtained were the result of their own
 15 requests for productions and their own search terms; not requests by the AGs. *See Id.* ¶ 14–15. Plaintiffs
 16 deposed key witnesses who—it appears—were never before questioned by AGs, such as K.C.
 17 Crosthwaite, Mr. Pritzker, and Mr. Valani, all of whose testimony was crucial for the RICO case. *Id.*
 18 ¶ 17. In fact, it was only by analyzing Mr. Pritzker’s documents that Plaintiffs became aware that his
 19 son-in-law, Christopher Olin, was a relevant witness. *Id.* ¶ 15. Mr. Olin’s testimony was crucial in the
 20 *SFUSD* trial to establish Mr. Pritzker’s intent, rebut Mr. Pritzker’s self-serving narrative, and support the
 21 allegations of a RICO conspiracy. *Id.* Class Counsel tracked down former employee Scott Dunlap in
 22 Austria and then secured—over Mr. Dunlap’s objection—an order authorizing alternative service under
 23 the Walsh Act. *Id.* ¶ 18. Mr. Dunlap’s testimony was crucial in establishing both the personal role the
 24

25
 26 ¹⁵ The North Carolina complaint copies, almost verbatim, the allegations describing the parties in the
 27 Second Amended Consolidated Class Action Complaint (“SACAC”), uses many of the same images
 28 regarding the Directors (*e.g.*, the same org charts), many of the same quotes from the same sources, and
 generally relies heavily on the MDL for both historical tobacco industry material and, more important,
 the crucial evidence about the role and involvement of the Directors. Sharp Reply Decl., ¶ 16.

1 Directors played in JLI's activities. *Id.* Class Counsel are not aware of any AG (or anyone else, for that
 2 matter) who deposed Messrs. Olin and Dunlap. *Id.* ¶¶ 15, 18.

3 **iv. Government Lawyers Did Not Create the Benefit to the Class**

4 The claim that the FDA and AG actions were in any way “responsible for creation of [the] fund”
 5 is simply not supported by the record. Stephens Obj. at 20. No government regulator secured
 6 compensation for the Class. This is not a case where Class Counsel seek compensation for “the benefits
 7 created by public agencies.” *Id.* (quoting *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*,
 8 148 F.3d 283, 337 (3d Cir. 1998)). *Prudential*, cited by Stephens, stands in perfect contrast to this case.
 9 There, the class plaintiffs sought credit for (and fees in proportion to) a settlement reached between a
 10 multi-state insurance regulator task force and the insurer defendant. *Id.* at 290-91. On appeal, the court
 11 was understandably skeptical of the class plaintiffs’ claim that they had served as a “catalyst” of the
 12 entire government program. *Id.* at 336-37. In fact, the “evidence . . . suggest[ed] that, absent the
 13 institution of the class action proceedings,” the government settlement would have happened anyway.
 14 *Id.* at 337.¹⁶

15 Here, there is no colorable claim, let alone evidence, that the result for the Class is traceable to
 16 anything but Class Counsel’s efforts. Stephens recounts media speculation (from early 2020, well after
 17 this litigation began) that JLI would face settlement pressure from AG investigations. Stephens Obj. at
 18 23. But that same article emphasized what such a settlement could look like: JLI would “change its
 19 marketing practices.” *Id.* (quoting Collins & Perrone article). But changing JLI’s marketing practices did
 20

21 ¹⁶ *Wininger v. SI Mgmt L.P.*, 301 F.3d 1115 (9th Cir. 2002), is a variation on same theme, albeit with
 22 unusual facts. There, class counsel successfully sued to block the dissolution of a partnership, later
 23 entered into a class settlement permitting a dissolution, and then sought fees based on the increase in
 24 value of limited partners’ shares as between the blocked plan and the settlement plan. *Id.* at 1118. The
 25 court found that much of the increase in value was caused not by the litigation but by the independent
 26 increase in value of the company, and so there was no true “quantifiable” fund against which to award a
 27 percentage fee. *Id.* at 1123-25. The court accordingly remanded to apply the lodestar method. *Id.* at
 28 1127. Stephens also cites *In re Johnson & Johnson Derivative Litig.*, 2013 WL 6163858 (D.N.J. Nov.
 25, 2013), but that case is distinguishable. *See id.* at *11 (explaining that “federal . . . investigations had
 progressed substantially at the time of the filing, . . . there was no groundbreaking issue[, the defendant]
 is solvent, and the individual directors and officers were the beneficiaries of an insurance policy”).

not provide compensation to anybody (as noted above, those changes were used as arguments *against* class certification); only this class litigation did that. *See Volkswagen*, 2017 WL 1474312, at *4 (rejecting a similar argument, and noting that government enforcement did not compensate consumers).

Stephens relies on a law review article for the proposition that a risk enhancement is not justified when government litigation precedes or parallels class litigation. Stephens Obj. at 20-21. But the article is premised on two examples that—for opposite reasons—disprove Stephens’ point. The first is the Microsoft litigation. Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1, 7 (2000). There, a wave of class litigation came only *after* complete “findings of fact” in the government’s case established liability. *Id.* Any comparison between this litigation and that case is baseless. The second example is the state tobacco litigation. *Id.* at 9-13. Those proceedings illustrate how, even when (unlike here) government litigation generates game-changing “discovery and momentum,” private litigation can remain risky business. *Id.* See Section III.A.2.a, *supra* (discussing failed tobacco products class actions).¹⁷

3. Fees are Appropriately Calculated Based on the Gross Settlement Fund, Not the Net Fund

As noted above, the Ninth Circuit directs courts to award reasonable attorneys’ fees based on the unique circumstances of the case. *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000). A reasonable fee can be based on a percentage of the gross or net settlement fund because “the reasonableness of attorneys’ fees is not measured by the choice of the denominator.” *Id.* Thus, “the district court may calculate the fee award using the gross settlement amount.” *Id.* The Ninth Circuit and this Court have repeatedly approved fee requests based on the gross fund, if the resulting fee is reasonable. *E.g.*, *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015); *Krommenhock v. Post Foods*, 2021 WL 2910205, at *2 (N.D. Cal. June 25, 2021) (approving attorneys’ fees at 30% of the gross settlement fund); *Larsen*, 2014 WL 3404531, at *8–9 (approving attorneys’ fees at 28% of the total settlement fund).

¹⁷ Stephens’ application of Erichson’s article is a stretch in many ways, including the non sequitur that “intense public scrutiny of JUUL” might reduce “settlement administration” costs. Stephens Obj. at 21.

Stephens argues that the Court should exclude settlement and litigation expenses from the fee calculation because they are not part of the value received by members of the Class. Stephens Obj. at 8-9. The Ninth Circuit rejected this same objection from Stephens' counsel in *In re Online DVD*. 779 F.3d at 953 (rejecting argument that "the \$4.5 million in notice and administrative costs . . . do not inure to the benefit of the class"). The Ninth Circuit explained that "administrative costs in particular make it possible to distribute a settlement award 'in a meaningful and significant way.' Similarly, notice costs allow class members to learn about a settlement and litigation expenses make the entire action possible." *Id.* Stephens likewise provides no basis for his assertion that litigation expenses—which are essential to the creation of a class recovery in the first place—do not benefit the Class. While Stephens argues that the better "policy" is to base fees on the net settlement, the Ninth Circuit in *Powers* rejected that bright line rule (229 F.3d at 1258), and district courts have consistently granted awards based on the gross settlement where the circumstances warrant it. Nor does the policy of incentivizing efficient cost expenditures apply here: as Class Counsel explained, the requested expense payment of \$4.1 million—which Stephens does not challenge—is reasonable and reflects substantial cost-savings and efficiencies due to the nature and conduct of this litigation. Fee and Expense Motion at 18-19. Stephens' general policy preferences cannot serve as a substitute for what is reasonable in this case.

B. Stephens' Arguments Concerning the Lodestar Crosscheck Are Baseless

Stephens argues that a "lodestar crosscheck does not support the requested fee." Stephens Obj. at 11. As a threshold matter, use of a crosscheck of any kind is discretionary, *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 784 (9th Cir. 2022), especially in situations like this where the Court is intimately familiar with the litigation and the work performed. *Andrews v. Plains All American Pipe L.P.*, 2022 WL 4453864, at *2 (C.D. Cal. Sept. 20, 2022) (finding a cross-check unnecessary in light of the "exceptional circumstances of this case and the Court's extensive involvement in supervising" the litigation); *see also Senne v. Kansas City Royals Baseball Corp.*, 2023 WL 2699972, at *18 (N.D. Cal. Mar. 29, 2023) ("a cross-check is not required so long as the court achieves a reasonable result using the method it selects.").

Given that a crosscheck is discretionary, there is no basis for Stephens' assertions that there is a "strong presumption" that the lodestar amount reflects an appropriate fee award. Stephens Obj. at 18-19.

The case he relies on for this proposition arose in the context of statutory fee-shifting, not common fund cases, as Stephens himself acknowledges. *Id.* at 19 n.13. In common fund cases, the Ninth Circuit has recognized that the preferred approach is to use the percentage method “in lieu of the more time-consuming task of calculating the lodestar.” *Bluetooth*, 654 F.3d at 942.

Stephens overlooks two other important considerations as well. First, even if it were required, the purpose of a crosscheck is to ensure that the multiplier on Class Counsel’s lodestar is not “extraordinarily high or low.” *Kang v. Wells Fargo Bank, N.A.*, 2021 WL 5826230, at *16 (N.D. Cal. Dec. 8, 2021) (reducing a requested 6.24 multiplier to 5.47 after conducting a cross-check). The crosscheck should “do rough justice” to confirm the reasonableness of an award but should “not result in a second major litigation.” *See Hefler v. Wells Fargo & Co.*, 2018 WL 6619983, at *14 (N.D. Cal. Dec. 18, 2018). Second, regardless of the level of deference given to the lodestar figure, the Ninth Circuit has recognized that in the vast majority of megafund cases, fee awards exceed the lodestar (often by a significant amount). *Vizcaino*, 290 F.3d at 1047; *see also In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 341 (9th Cir. 1998) (“[W]e are cognizant that [m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied(.)”).

With respect to the calculation of the lodestar itself, there is no basis for Stephens’ proposed adjustments and, even if there were, substantial adjustments would still result in a multiplier well within the ranges endorsed by the Ninth Circuit and in this District—all of which confirms the reasonableness of the requested fee award.

1. Stephens Does Not Show That the Fee is Unreasonable Based on a Lodestar Crosscheck

In the Fee and Expense Motion, Class Counsel offered various metrics to evaluate the lodestar in this case given the services provided by counsel for various plaintiff groups. Dkt. 4055 at 14-16. Each of those metrics shows that the requested fee award is reasonable, even if reduced in the ways Stephens suggests.

Lodestar for Class Committee and Other Firms Focused on Class Claims: Considering *only* time incurred by the six firms whose efforts focused predominantly on the Class claims, the requested fee award amounts to a 2.91 multiplier on the \$26,328,149.75 lodestar—a multiplier routinely awarded in

1 similarly complex litigation. Dkt. 4055 at 15. Even reducing document review and fact deposition time
 2 conducted by these firms time by 75%, the result would be a lodestar of \$20,523,481.33 and a 3.7
 3 multiplier—still well within the range of approval, as illustrated by the Ninth Circuit’s affirmance of a
 4 fee award in *Vizcaino* that was 28% of the common fund and resulted in a 3.65 multiplier. 290 F.3d at
 5 1050-52.

6 Of course, considering only the time spent by six class firms dramatically understates the
 7 lodestar incurred to the benefit of the Class, which itself suggests that the requested fee award is well
 8 within the range of acceptance in the Ninth Circuit. Consider expert work in this MDL, which proceeded
 9 in two phases: expert reports on common issues (such as the addictiveness of JUUL and its propensity to
 10 addict minors), followed by case-specific experts (such as specific causation reports for bellwether
 11 personal injury plaintiffs). *See* Sharp Decl., ¶¶ 95-98. The first phase of common expert work, much of
 12 which redounded to the benefit of the Class, was completed in December 2021. *Id.* Plaintiffs’ counsel
 13 other than the six firms primarily focused on class-specific issues spent more than \$12.5 million in time
 14 working with experts, defending their depositions, reviewing defendants’ competing expert reports, and
 15 deposing defendants’ experts. Sharp Reply Decl., ¶ 37. Adding that expert-specific time to the \$20.5
 16 million attributable to these six firms yields a 2.3 multiplier, again consistent with the range recognized
 17 by the Ninth Circuit, and consistent with or well below the multipliers awarded in cases that Stephens
 18 cites. *See Vizcaino*, 290 F.3d at 1051 n.6 (vast majority of multipliers in megafund cases fall between
 19 1.0 and 4.0); *Facebook*, 522 F. Supp. 3d at 633 (4.71 multiplier, which was “in line with comparable
 20 settlements”); *In re High-Tech Employee Antitrust Litig.*, 2015 WL 5158730, at *11 (N.D. Cal. Sept. 2,
 21 2015) (2.2 multiplier). Taking into account other common benefit categories (*e.g.*, discovery of
 22 defendants and third-parties, including analysis and negotiation of responses, and briefing disputed
 23 issues), further increases the lodestar and decreases the multiplier.

24 *Klonoff Calculation*: Professor Robert H. Klonoff, a law professor (and former dean) at Lewis &
 25 Clark Law School, submitted a declaration proposing a method of evaluating the lodestar in light of the
 26 multiple types of cases in the MDL, which resulted in a 1.36 multiplier if the Court awarded the
 27 requested fees. Dkt. 4055 at 15. Applying Stephens’ proposed adjustments, the result is a \$37.9 million
 28 lodestar (Stephens Obj. at 19 n.12), which is roughly a 2.0 multiplier, and thus consistent with the cases

Stephens relies on and other Circuit precedent.

Lodestar in Discrete Common-Benefit Categories: Class Counsel’s lodestar for several discrete categories (Factual Investigation, Discovery of Defendants, Document Review, Scientific Research, Fact Depositions, Class Certification, and Experts) is \$107,351,217.50 (.71 multiplier). Adjusting the lodestar for the Document Review and Fact Deposition categories in the manner suggested by Stephens yields a lodestar of \$43,609,332.66 and a multiplier of 1.75.

Total Lodestar: The requested fee award is a .38 multiplier on the total lodestar incurred in the MDL through the date of settlement (\$199,336,544.05). Dkt. 4055 at 14-15. Even if the lodestar is calculated using the deductions Stephens advocates and all other time is reduced by 25%, the resulting lodestar would be \$99,933,325.28, which translates to a substantial negative multiplier of .77. For Class Counsel’s award to match their lodestar, the Court would need to apply Stephens’ deductions and reduce the remaining lodestar by an unreasonable 42%. And even if the Court applied the staff attorney rate of \$63.77 that Stephens says should be applied to document review hours to *all* hours across the board in the MDL, the result would be a lodestar of \$23,170,453.26—an untenable scenario that even Stephens does not advocate for that would still result in a 3.3 multiplier, which again is within the range of accepted multipliers. For bigger picture context, even assuming an award of the full 30% fee requested by Class Counsel, the attorneys’ fees attributable to the Class fund and the common benefit holdback under Case Management Order 5(A) will amount to less than a 1.0 multiplier on the full lodestar of common benefit time incurred by all firms in the MDL. Sharp Reply Decl., ¶ 39. Again, there is no windfall here.

Stephens argues that any multiplier in this case should be minimal because the litigation was purportedly low-risk. Stephens Obj. at 18-25. But as shown above, Stephens’ contention is contrary to the record. For all the reasons discussed in the Fee and Expense Motion and above, Class Counsel earned their fee here. *See, e.g., Facebook*, 522 F. Supp. 3d at 632 (awarding a 4.71 multiplier in light of “how hard fought this case was and the substantial factual disputes that remained for trial”); *High-Tech*, 2015 WL 5158730, at *10 (2.2 multiplier where “Class Counsel devoted considerable time and effort litigating this case over a period of four years”).

Stephens also argues that the Court should consider the value of the Altria settlement. Stephens

Obj. at 8. The Court of course has discretion to consider the total value of the aggregate settlements, but should do so in the context of a pending fee motion related to the final Altria settlement, as the authority Stephens relies on did. *See In re Transpacific Passenger Air Trans. Antitrust Litig.*, 2019 WL 6327363, at *1 (N.D. Cal. Nov. 26, 2019) (considering aggregate amounts of settlements in the context of the “third and final settlement”). It is premature at this point, however, for the Court to take into account the potential fees on a settlement that has not even been preliminarily approved. Nor is Stephens correct that the lodestar reflects time billed after the Settlement. The lodestar data used to generate the relevant lodestar figures was limited to time billed through December 6, 2022. Sharp Reply Decl., ¶ 41. It is worth noting, however, that Girard Sharp (the Co-Lead Counsel with primary responsibility for the class litigation) billed over \$190,000 between December 6, 2022, and January 31, 2022, finalizing the settlement and related documentation, but has not included that time in the lodestar calculations. *Id.*

2. Stephens’ Contentions Concerning Hourly Rates for Document Review are Misguided and Seek to Impose an Unreasonable Hourly Rate

According to Stephens, Class Counsel have overstated their lodestar by almost \$39 million by billing at excessive rates for more than 100,000 hours of document review. Stephens Obj. at 11-13. He argues that the average \$422.58 hourly rate for document review is unreasonable because it greatly exceeds the lower hourly rates typically charged for contract or staff attorneys. *Id.* One problem with Stephens’ argument is that the average rate in this case is consistent with rates approved in this district and elsewhere in California for contract and staff attorneys. *See In re MacBook Keyboard Litig.*, 2023 WL 3688452, at *15 (N.D. Cal. May 25, 2023) (approving \$425 for contract attorneys); *In re Glumetza Antitrust Litig.*, 2022 WL 327707, at *8 (N.D. Cal. Feb. 3, 2022) (finding \$400 for staff attorney reasonable); *Uziel v. Super. Ct.*, 2021 WL 5830040, at *8 (C.D. Cal. Oct. 19, 2021) (contract attorney rates of \$375 to \$450 an hour reasonable). Focusing on the average billing rate as Stephens does is also misguided because it erroneously assumes that most of the work was, or should have been, undertaken by contract attorneys. Document review in this complex case was conducted in a variety of contexts and required a substantial amount of second or third level review involving attorneys with higher levels of experience, which is expected in complex litigation. *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2012 WL 13209696, at *8 (N.D. Cal. Nov. 9, 2012) (“higher-billing lawyers would be expected

to perform some document review”); *Martin v. Toyota Motor Credit Corp.*, 2022 WL 17038908, at *13 (C.D. Cal. Nov. 15, 2022) (declining to reduce hours or rates where partners were involved in high level document review); *Lawson v. Spirit AeroSystems, Inc.*, 2020 WL 6343292, at *12 (D. Kan. Oct. 29, 2020) (“[A] party is not required to entirely exclude mid- and senior-level attorneys from high-level involvement in document review.”). And even with respect to first-level document review, courts have approved of the use of staff attorneys. *See Sharp Rely Decl.*, Ex. 10 (*United States, et al. v. Allergan*, No. 8:18-cv-00203, Dkt. 195 at 3 (C.D. Cal. July 24, 2023) (approving a \$475 hourly rate and rejecting argument that first-level review should have been done by contract attorneys instead of staff attorneys)). Stephens’ argument that staff attorneys should be billed “at cost” also makes no sense; staff attorneys are law firm employees.

While Stephens insists that all document review is created equal and should have been delegated across the board to contract attorneys at a rate of no more than \$63.77, a court “may not attempt to impose its own judgment regarding the best way to operate a law firm, nor to determine if different staffing decisions might have led to different fee requests. The difficulty and skill level of the work performed, and the result achieved—not whether it would have been cheaper to delegate the work to other attorneys—must drive the district court’s decision.” *Moreno v. City of Sacramento*, 534 F.3d 1106, 1115 (9th Cir. 2008). The “[u]se of more experienced attorneys for certain tasks can be more efficient than deploying less senior attorneys.” *Stonebrae, L.P. v. Toll Bros.*, 2011 WL 1334444, at *13 (N.D. Cal. Apr. 7, 2011), *aff’d*, 521 F. App’x 592 (9th Cir. 2013).

Document review in this case was not straightforward. JLI produced more than 26 million pages of documents while the Altria Defendants produced another 6.6 million pages. *Sharp Decl.*, ¶ 49. A discovery committee was charged with organizing and supervising the document review teams and developed a multi-tier document review structure designed to identify key documents and potential deponents. *Id.* Staffing second and third level document review with more experienced attorneys was thus reasonable and necessary. *See Pike v. Cnty. of San Bernardino*, 2020 WL 1049912, at *5 (C.D. Cal. Jan. 27, 2020) (“[T]he [C]ourt does not agree that document review is menial or mindless work; in complex civil litigation such as the instant case, it is a critically important and challenging task.”) (citation omitted). Stephens cites to no case imposing an across-the-board rate of anywhere close to \$64

for all document review time. Even the cases Stephens relies on the most found that a \$240 hourly rate would be at the “low end” of rates for contract and staff attorneys. *Anthem*, 2018 WL 3960068, at *20. And setting all this aside, as discussed above, applying the unreasonable adjustments Stephens suggests still does not materially alter the results of the lodestar cross-check.

3. Stephens’ Argument that the Lodestar is “Likely Overstated” is Contrary to the Record and Based on Speculation

a) The Lodestar Reflects the Amount of Work Conducted by Class Counsel

Looking solely at the total number of hours spent, Stephens argues that the number of hours spent is “outrageously inflated on its face.” Stephens Obj. at 1. The record confirms otherwise. The Court has closely overseen this litigation, holding monthly status conferences and often entertaining appearances multiple times per month (including before then-Magistrate Judge Corley for discovery matters). Based on these firsthand observations, the Court has frequently commented on both the tremendous volume of work that occurred in the MDL, and the expeditious and professional manner in which that work was carried out. At a January 12, 2022, conference, for example, Judge Corley stated that she was “super impressed” with “how much [counsel] have accomplished.” Dkt. 2767 at 10. And in an August 18, 2021, discovery conference, Judge Corley remarked that the parties’ efforts to complete “this much discovery” under tight deadlines “is a model, a model MDL.” Dkt. 2281 at 21. These efforts directly led to the expeditious pace at which these cases were prepared for trial, a key pressure point that facilitates settlement. As this Court recognized, throughout the litigation there was “so much work going on” (Dkt. 3430 at 10) and those efforts put “these cases into a place where they can be resolved” (Dkt. 3772 at 40).

The objective facts also provide no basis for speculation that the lodestar is overstated: over 33 million pages reviewed, over 100 fact depositions taken, discovery of over 80 class representatives conducted, depositions of 20 class representatives defended, 43 combined plaintiff and defense experts who rendered reports and were deposed, extensive briefing across a panoply of topics (including motions to strike 22 of plaintiffs’ experts spanning hundreds of pages, multiple rounds of motions to dismiss, highly contested class certification proceedings), and of course, preparation for the Class trial,

1 and pretrial work in personal injury and government entity bellwether cases that also served to advance
 2 the class case towards trial readiness. Sharp Decl., ¶ 42. Stephens makes no mention of these facts.
 3 Without any actual review or acknowledgement of the record, Stephens has no basis for asserting that
 4 too many hours were spent in the litigation or that the lodestar is overstated.

5 **b) Stephens' Complaints About Class Counsels' Billing Records Are**
 6 **Unfounded**

7 Stephens' contention that Class Counsel failed to provide detailed billing records is likewise
 8 baseless. As explained in the Fee and Expense Motion, as part of Judge Andler's review, Class Counsel
 9 provided her with detailed billing records showing the amount billed by each lawyer, for each task, on
 10 each day. Sharp Decl., ¶ 121. Those billing records were then provided to Judge Orrick throughout the
 11 course of the litigation. *E.g., id.*, Ex. 1 at 1-3 (letter transmitting time reports to the Court). Judge
 12 Andler's assessment of the time billed after reviewing those records was that "the tasks, hours and
 13 expenses incurred were appropriate, fair and reasonable and for the common benefit." *E.g.*, Sharp Decl.,
 14 Ex. 1 at 12. Thus, Stephens' objection amounts to an assertion that the Court should not accept the
 15 lodestar calculation because he did not have access to the records, but Stephens cites no case suggesting
 16 that Class Counsel is required to provide their detailed billing record to objectors. *See Chambers v.*
 17 *Whirlpool Corp.*, 980 F.3d 645, 672 (9th Cir. 2020) (rejecting contention that objector was "entitled to
 18 full access to class counsel's billing records" even where the fee is lodestar-based and distinguishing
 19 *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536 (9th Cir. 2016), on which Stephens relies);
 20 *Hartless v. Clorox Co.*, 273 F.R.D. 630, 644-45 (S.D. Cal. 2011), *aff'd in part*, 473 F. App'x 716 (9th
 21 Cir. 2012) ("The Court overrules the objectors' request for complete time records and postponement of
 22 the issue until they are received. Neither California courts or federal courts require counsel to submit
 23 complete time records when requesting an attorneys' fee award.").

24 As noted above, Stephens' approach overlooks the principle that a lodestar cross-check should
 25 not be a line-by-line review to re-calculate the lodestar or to set a fee based on the lodestar, and instead
 26 must be sufficient "to ensure that class counsel has done the work necessary to justify the fee sought." *In*
 27 *re Capacitors Antitrust Litig.*, 2018 WL 4790575, at *6 (N.D. Cal. Sept. 21, 2018). As part of this
 28 analysis, "district courts may rely on summaries submitted by the attorneys and need not review actual

1 billing records.” *Id.* (quotation omitted); *see also Rodriguez v. Nike Retail Services, Inc.*, 2022 WL
 2 254349, at *5 (N.D. Cal. Jan. 27, 2022); *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap*
 3 *Antitrust Litig.*, 768 Fed. App’x 651, 654 (9th Cir. Apr. 17, 2019). Thus, even if Judge Andler did not
 4 personally review *every* time entry, her review was more than adequate for the purposes of a lodestar
 5 cross-check.

6 Neither of the reasons Stephens offers for disregarding Judge Andler’s review has merit. *First*,
 7 Stephens is incorrect that review of time records is “non-delegable.” Stephens Obj. at 17. Rule 23(h) is
 8 explicit that “[t]he court may refer issues related to the amount of the award to a special master or a
 9 magistrate judge, as provided in Rule 54(d)(2)(D).” Appointing a special master to oversee the review of
 10 common benefit fees is common in complex litigation, and Circuit courts have repeatedly approved of
 11 the use of special masters in reviewing attorneys’ fees. *E.g.*, *In re Genetically Modified Rice Litig.*, 764
 12 F.3d 864, 872 (8th Cir. 2014) (district court did not abuse its discretion when it adopted special master’s
 13 analysis on attorneys’ fees); *Carlsen v. Glob. Client Sols., LLC*, 542 F. App’x 594, 595 (9th Cir. 2013)
 14 (affirming “an order granting and approving attorney fees as recommended by the [special master’s]
 15 Report”); *UFCW Loc. 880-Retail Food Emps. Joint Pension Fund v. Newmont Min. Corp.*, 352 F. App’x
 16 232, 237 (10th Cir. 2009) (“[A]dditional insurance for protecting the interests of the class is provided
 17 where, as here, fee applications are referred to a special master.”). Courts in this district also routinely
 18 rely on special masters to assist with fee requests. *E.g.*, *Adkins v. Facebook, Inc.*, 2021 WL 1817047, at
 19 *7 (N.D. Cal. May 6, 2021); *In re Capacitors Antitrust Litig.*, 2020 WL 6544472, at *2 (N.D. Cal. Nov.
 20 7, 2020); *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 4126533, at *3 (N.D. Cal. Aug. 3,
 21 2016); *In re Dynamic Random Access Memory Antitrust Litig.*, 2014 WL 12879521, at *2 (N.D. Cal.
 22 June 27, 2014). The fact that Special Master Andler was appointed and carried out her duties during the
 23 litigation, as opposed to post-settlement, is irrelevant. And there is no basis for Stephens’ suggestion that
 24 a retired judge abdicated her court-appointed responsibilities in exchange for a payout for Class
 25 Counsel. Stephens Obj. at 17. There is nothing unusual about a special master being compensated by
 26 plaintiffs’ counsel, as Rule 53 expressly contemplates that one side may be responsible for paying a
 27 special master’s fees. *See* Fed. R. Civ. P. 53(g)(2) (compensation may be paid either from a fund within
 28 the court’s control or “by a party or parties[.]”).

Counsel identified well-accepted billing rate ranges and provided the Court with information showing what percentage of hours billed were within those ranges, which allows the Court to assess the extent of any potential outlier rates. Class Counsel then reported the resulting percentages (regardless of what they were). Stephens' approach of reporting just the outlier rates does not provide any information about what share of the rates are within widely-accepted ranges. In any event, these issues are moot as Class Counsel showed that capping all hourly rates at these ranges had a minimal effect on the lodestar. Fee and Expense Motion at 17-18.

Stephens also argues that the number of hours billed in the "Fact Deposition" category was excessive given the number of depositions conducted. Stephens Obj. at 15. The number of hours expended on depositions resulted in substantial efficiencies in other parts of the case. First, many of the depositions were conducted with the expectation they would be used at trial, which requires an additional degree of preparation and coordination in setting the goals of the deposition. Sharp Reply Decl., ¶ 44. And many of the depositions were in fact played in the SFUSD trial (and, as noted, the Minnesota AG trial). *Id.*, ¶¶ 9–10. Second, the presence of lawyers at depositions—in addition to the lawyer taking the deposition—resulted in greater familiarity with the record, more efficient preparation for related depositions, more effective briefing, and reduced later time reviewing transcripts. *Id.*, ¶ 45. In any event, as detailed above, revising the hours in the Fact Depositions categories as Stephens suggests does not impact the lodestar crosscheck analysis.

And while Stephens heavily relies on *Anthem* and that court's concern with excessive billing and the number of firms involved, the court found that the "novel legal issues" in the case made use of a lodestar unhelpful and granted a 27% fee award. 2018 WL 3960068, at *5, 16. *Anthem* is also factually distinguishable. There, the court rejected an eight-firm leadership team in favor four co-leads, yet 53 firms billed time. *Id.* at *3. Here, after considering the complexity and multifaceted nature of this case, the Court appointed lawyers from 21 firms to leadership positions. Dkt. 341 at 1-2. Eighty-eight percent of the lodestar was billed by these firms. Sharp Reply Decl., ¶ 38. The balance was of the lodestar was largely incurred by JCCP counsel, firms representing bellwethers clients, and a firm whose contributions were limited to the non-duplicative task of overseeing and organizing class plaintiff discovery. *Id.*

C. The Court May Consider Professor Klonoff's Opinions in Arriving at An Independent Conclusion Regarding a Reasonable Fee Award

In support of the Fee and Expense Motion, Class Counsel submitted a declaration from Professor Klonoff who, in addition to being a law professor, is the author or co-author of several texts on aggregate litigation (including the Wright & Miller *Federal Practice and Procedure* volumes on class actions and attorneys' fees) and has personally handled more than 100 class actions as a lawyer with a major international law firm and thereafter. Klonoff Declaration, Dkt. 4056-2, ¶¶ 2-6.

Stephens seeks to strike Professor Klonoff's declaration, arguing it is impermissible expert testimony. Stephens Obj. at 9-11. But numerous courts have held that "expert testimony regarding attorneys' fees is appropriate." *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1172 (C.D. Cal. 2010) (citing *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 556 F.3d 815, 827 (9th Cir. 2009)). Courts routinely rely on expert testimony from law professors and other attorneys when evaluating the reasonableness of a fee request, and courts in this district and across the country have cited Professor Klonoff's opinions and analysis in class settlements and attorneys' fees requests. *See, e.g., In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 2017 WL 2212783, at *21 (N.D. Cal. May 17, 2017); *Jabbari v. Wells Fargo & Co.*, 2018 WL 11024841, at *7 (N.D. Cal. June 14, 2018).¹⁸

¹⁸ *See also Broiler Chicken*, 2022 WL 6124787, at *2 and n.4 (noting that "[a]t the Court's invitation" the plaintiffs had "submitted an expert declaration on the previous [fee] motion by Professor Robert Klonoff" and that the court "referenced and cited" the declaration as support for its findings); *Syngenta*, 357 F. Supp. 3d at 1112 ("The Court notes at the outset that counsel have supported their request with an expert declaration from Professor Robert Klonoff. The Court agrees with Professor Klonoff that the facts and circumstances of this case . . . distinguish this case from other common fund cases with large settlements and warrant a substantial fee award."); *In re Syngenta AG MIR 162 Corn Litig.*, 2018 WL 6839380, at *4 (D. Kan. Dec. 31, 2018) (crediting the analysis of Professor Klonoff over that of five other professors that submitted declarations); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1037 (N.D. Ill. 2011) ("credit[ing] Klonoff's opinions regarding the fairness of the fee request"); *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 165 (E.D. La. 2013) (offering declarations "regarding the certifiability of the Class and the fairness of the Settlement"); *In re Loestrin 24 Fe Antitrust Litig.*, 2020 WL 4038942, at *5 (D.R.I. July 17, 2020) (court relied in part on a "comprehensive and helpful declaration" from a law professor in analyzing fee request), *report and recommendation adopted*, 2020 WL 5201275 (D.R.I. Sept. 1, 2020); *Savani v. URS Pro. Sols. LLC*, 2014 WL 172503, at *8 (D.S.C. Jan. 15, 2014) (noting law professor's "expert testimony has been accepted by District Courts in the region on the matter of reasonableness of

Stephens does not question Professor Klonoff’s qualifications, but asks the Court to strike or ignore his declaration because it purportedly contains improper legal conclusions. Stephens Obj. at 8-9. But the *Daubert* standard Stephens invokes concerns the admissibility of expert testimony *at trial*, and “[c]ourts have held that Rule 702 is flexible at the final approval stage.” *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1268 n. 14 (11th Cir. 2021) (citing *Int’l Union, United Auto., Aerospace, and Agric. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 636–37 (6th Cir. 2007)) (“The Rule 702 argument, again, overlooks the differences between a full trial and a fairness hearing. In a trial, the judge must strictly screen expert opinions for evidentiary relevance and reliability because a jury often has difficulty assessing such evidence. In a fairness hearing, the judge does not resolve the parties’ factual disputes but merely ensures that the disputes are real and that the settlement fairly and reasonably resolves the parties’ differences.”) (quotation marks and citation omitted); William B. Rubenstein, 4 Newberg on Class Actions § 13:42 (6th ed.) (“The court has wide discretion in establishing the procedures of the fairness hearing, which need not resemble a trial. Accordingly, traditional rules of evidence do not necessarily apply to the fairness hearing.”).¹⁹ Accordingly, “*Daubert* does not govern at the final approval stage” and the Court may consider Professor Klonoff’s opinions. *See In re Nat’l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 443 (3d Cir. 2016) (“[W]e have never held that district courts considering the fairness of a class action settlement should consider the admissibility of expert evidence under *Daubert*.”); *Am. Int’l Grp., Inc. v. ACE INA Holdings, Inc.*, 2012 WL 651727, at *20 (N.D. Ill. Feb. 28, 2012) (“[T]he Federal Rules of Evidence and the requirements of *Daubert* and its progeny do not apply at a fairness hearing—and similarly do not apply at a hearing on fees and costs. . . .”). Doing so would not usurp the role of the Court, as Stephens

attorney’s fees awards”); *Asghari v. Volkswagen Grp. of Am., Inc.*, 2015 WL 12732462, at *43 (C.D. Cal. May 29, 2015).

¹⁹ The cases Stephens cites are inapposite as they concern the admissibility of expert testimony *at trial*. *See, e.g., Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (appeal concerning district court’s rulings on motions in limine excluding expert testimony prior to trial); *Pinal Creek Grp. v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042 (D. Ariz. 2005) (excluding certain law professor testimony at trial). In another case, the court simply assumed that *Daubert* applies at the final approval stage. *See Stathakos v. Columbia Sportswear*, 2018 WL 1710075, at *5 n.6 (N.D. Cal. Apr. 9, 2018).

suggests (Stephens Obj. at 10), because the Court will make a decision regarding Class Counsel’s fee request based on “its own independent judgment.” *See Equifax*, 2020 WL 256132, at *43 (rejecting similar argument and declining to strike Professor Klonoff’s and other experts’ declarations).

Even if *Daubert* did apply here—and it does not—Professor Klonoff’s declaration satisfies the standard for admissibility, because it is helpful to the Court and based on his experience litigating, teaching, and writing about class actions, as well as from participating in the 2018 amendments to Rule 23 while serving on the Federal Civil Rules Advisory Committee. *See, e.g., Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999) (district court has “broad latitude” to admit expert testimony based on “professional studies or personal experience”).²⁰ Moreover, “[t]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.” *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005); *cf. Att’y Gen. of Ok. v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009) (“[W]hile *Daubert*’s standards must still be met, the usual concerns regarding unreliable expert testimony reaching a jury obviously do not arise when a district court is conducting a bench trial.”).

In addition, a crucial part of Professor Klonoff’s opinion involves practical suggestions for how to divide up the total JUUL lodestar among multiple cases, a fact-based challenge that is particularly well-suited for a fee expert because no case law is completely analogous. If the Court believes that any portion of Professor’s Klonoff’s declaration amounts to a legal conclusion, the Court may simply disregard that portion, rather than rejecting the entire declaration. *See Parkinson*, 796 F.Supp.2d at 1172 & n.6 (denying defendant’s motion to strike declaration from professor, but noting that the court would disregard any legal conclusions); *In re Regions Morgan Keegan Sec., Derivative & Erisa Litig.*, 2012 WL 12840260, at *6 (W.D. Tenn. Jan. 4, 2012) (“the district judge is capable of sifting through the

²⁰ Stephens also criticizes Professor Klonoff’s conclusions because they are based on surveys of law, but courts have relied on expert opinions based on similar surveys. *See, e.g., In re Fed. Nat’l Mortg. Ass’n Sec., Derivative, & “ERISA” Litig.*, 4 F. Supp. 3d 94, 111 (D.D.C. 2013) (“empirical study” of fee awards in class actions discussed in law professor’s declaration supported reasonableness of fee); *In re Loestrin*, 2020 WL 4038942, at *7; *In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d 1330, 1366 (S.D. Fla. 2011).

1 declarations, disregarding these parts that may simply be legal argument, and focus on the pertinent
2 portions”); *Miller v. Cincinnati*, 709 F. Supp. 2d 605, 619-20 (S.D. Ohio 2008) (a court “is fully able to
3 disregard the implication of any impermissible legal conclusion”).

4 The request to strike or disregard Professor Klonoff’s declaration should be denied.

5 **IV. CONCLUSION**

6 For the foregoing reasons, Class Plaintiffs respectfully requests that the Court grant final
7 approval of the JLI Settlement and Class Counsel respectfully requests that the Court grant their motion
8 for attorneys’ fees, expenses, and service awards.

9
10 Dated: July 28, 2023

Respectfully submitted,

11
12 By: /s/ Dena C. Sharp

13 Dena C. Sharp
14 **GIRARD SHARP LLP**
15 601 California St., Suite 1400
16 San Francisco, CA 94108
17 Telephone: (415) 981-4800
18 dsharp@girardsharp.com

19
20 *Co-Lead Counsel and Proposed Settlement*
21 *Class Counsel*
22
23
24
25
26
27
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APPENDIX A

Objector(s)	Location of Objection in the Record	Objects to Substance of JLI Settlement?	General Description of Objection	Section Below in Which Objection is Addressed
Cade Beauparlant, Matthew Murhphy, and Marianne Savage	Dkt. 4062	Yes	Request that \$30 million of the JLI Settlement be distributed as <i>cy pres</i> to a non-profit organization	II.B.1
John Gugliotta	Dkt. 4026	Yes	Various objections to the notice and the absence of non-monetary relief	II.B.2
Olin Ashak	Dkt. 4086-1	No	Disagrees with the basis of the lawsuit and the process for objecting	II.B.3
Samuel Marcom	Dkt. 4033	No	Disagrees with the basis of the lawsuit and JUUL being singled out among e-cigarettes	II.B.3
Third-party filer ClaimClam and numerous ClaimClam clients	Dkts. 4087-90	No	Objection to Class Counsel's decision to disallow claims to be filed through third-party filer ClaimClam	II.B.4
Lawanda Ready	Dkt. 4086-2	No	No basis provided	II.B.5
John Stampfer	Dkt. 4086-3	No	No basis provided	II.B.5
Melisa Stawicki	Dkt. 4077	No	No basis provided	II.B.5
Austin Toole	Dkt. 4086-4	No	No basis provided	II.B.5

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2023, because the CM/ECF system was inoperable at the time of filing, I sent the foregoing document via email to the Court and to each of the objectors and objectors' counsel listed below. On July 29, 2023, once the CM/ECF system becomes operable again, I caused the foregoing document to be electronically filed with the Clerk of the Court using, which will automatically send notification of the filing to all counsel of record.

Andrew Rainer (admitted pro hac vice)
arainer@phaionline.org
Mark A. Gottlieb (admitted pro hac vice)
mark@phaionline.org
PUBLIC HEALTH ADVOCACY INST.
360 Huntington Avenue, CU117
Boston, MA 02115
(617) 304-6052

Neville S. Hedley (SBN 241022)
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW, Suite 300
Washington, DC 20006
Voice: 312-342-6008
Email: ned.hedley@hlli.org

Attorneys for Objector Reilly Stephens

*Attorneys for Objectors Matthew Murphy,
Cade Beauparlant, And Marianne Savage*

Individual objectors:

John D. Gugliotta (johng@inventorshelp.com)

Samuel Marcom (Sammarcom123@gmail.com)

Melisa Stawicki (missyfourniea@yahoo.com)

Zim Hang (zim@getclaimclam.com)

Olin Ashak (olin.ashak@hotmail.com)

Austin Toole (austintoole15@gmail.com)

Lawanda Ready (Lawandaready@gmail.com)

John Stampfer (johnstampfer@gmail.com)

By: /s/ Dena C. Sharp
Dena C. Sharp